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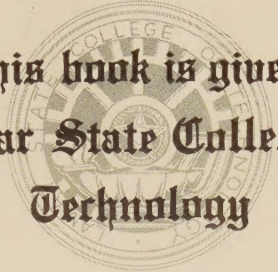




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# TEXAS LAW REVIEW

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## THE COURTS' POWER OVER ADMISSION AND DISBARMENT

The subject comprehends at least three distinct phases: standards of admission; standards of conduct; and the power to prescribe and administer the rules of admission and to exercise disciplinary control over professional conduct.

For the purposes of this paper it will be assumed that the standards of admission worked out and recommended by the American Bar Association after many years of thorough debate meet the present demands for preparation requisite for admission to practice law.<sup>1</sup>

Likewise it will be assumed that the standards of conduct found in the Canons of Ethics adopted by the American Bar Association are sufficiently comprehensive and practical to meet the requirements of the profession.<sup>2</sup>

The problem that gives most trouble and the one which has received less general consideration is the discovery of a responsible agency for authoritatively promulgating and administering these regulations. The remedies themselves offer no difficulties. For failure to comply with the requirements for admission, refusal to admit is the remedy; for infractions of the rules of conduct, warning, reprimand, suspension or disbarment as the facts may justify is adequate. But in whom shall the power of promulgation of authoritative standards and their admission be vested? Or rather in whom under our system of government is the power now vested? For no doubt it would be a difficult matter to go about setting up

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<sup>1</sup>Vol. XLVI, REPORTS OF AMERICAN BAR ASSOCIATION, p. 687; also Vol. XLVII, REPORTS OF AMERICAN BAR ASSOCIATION (1921), pp. 482-591.

<sup>2</sup>See Vol. XLIX, REPORTS OF AMERICAN BAR ASSOCIATION (1924), pp. 748-773; Jessup: THE PROFESSIONAL IDEALS OF THE LAWYER, published by G. A. Jennings Co., Inc., N. Y. (1925).

new constitutional machinery for such purpose, and the practical problem is to discover the agency upon whom this responsibility now rests and to point out the methods by which it shall act.

To be permitted to practice law is but a privilege, though a high one; it is not a property right, nor a matter of right at all. There are no embarrassments such as vested interests to be met in exercising control over those who enjoy this privilege.<sup>3</sup> The privilege is a public trust.

There is conflict of opinion and also confusion both of thought and expression as to which agency of our state governments is invested with power to regulate and control the profession. This comes about largely, perhaps, because of the difference between the English system of government and that of our own, as well as because of the impossibility of drawing any clear lines of demarcation between the powers of our legislative, judicial, and executive branches of government. And more specifically, perhaps, because of the failure in many instances to recognize that each branch of our government must exercise as necessarily incidental to its own primary power, powers primarily vested in the other two branches. In short, that the legislature must necessarily exercise both judicial and executive powers in the performance of its legislative functions, that the judiciary has administrative problems demanding the exercise of both legislative and executive powers, and that the executive branch likewise employs powers primarily delegated to the other two departments of government.

The principal theories which have been worked out in considering this particular problem are these: (1) that the power to prescribe rules for admission and for the regulation of professional conduct belongs to the legislative branch, while their enforcement lies within the province of the judiciary; (2) that the whole subject is one pertaining inherently to the judicial branch of government; (3) that while the whole subject is a judicial one, that branch of the government will respect any reasonable regulations prescribed by the legislature, so long as they are not restrictive, as a matter of comity between departments exercising sovereign powers of government. Perhaps there are slight variations of each of these theories, but in the main they represent the numerous decisions which have been rendered by many able courts. In our own jurisdiction the problem seems never to have been raised by any reported case. We

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<sup>3</sup>*Languille v. State*, 4 Tex. App. 320; *Ex Parte Williams*, 31 Tex. Cr. 272, 20 S. W. 580.

have nothing in our history to embarrass us; the question has remained open until we have been forced by our very numbers, by the weakness of our organization, the distressing growth of questionable practices and the gradual but certain supersession of professional standards by individual standards, to recognize its tremendous importance not alone to any one class of our citizens, but in fact to our entire social organism. And it is safe to say that nothing less than a comprehensive understanding of the profession's history; a full appreciation of the organization of our system of government; a sensitive reaction to the far-reaching effects that the legal profession must have on every phase of our social life; and a sympathetic attitude towards that school of thought which believes the tone of our social institutions, and particularly the law, can be improved by conscious efforts to that end; nothing less than real statesmanship from the bench can be expected to discover and outline the foundations of our professional structure.

\* \* \* \* \*

The early history of the legal profession furnishes one of the vital chapters in the history of the common law.<sup>4</sup> The power to appoint both pleaders and attorneys was early exercised as a royal prerogative.<sup>5</sup> But it was quickly handed over to the judges, and it was under their supervision that the profession enjoyed such a hardy development. The later acts of Parliament were but in aid of the

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<sup>4</sup>See 2 HOLDSWORTH'S HISTORY OF ENGLISH LAW, pp. 311-318, 484-512; 1 POLLOCK & MAITLAND HISTORY OF ENGLISH LAW, p. 190 et seq.; COSTIGAN'S CASES ON LEGAL ETHICS, Chap. I; Bolland: "Two Problems in Legal History," 24 LAW QUARTERLY REVIEW, 392; CHARLES WARREN, HISTORY OF THE AMERICAN BAR, Chap. I; Bruce, "The Judicial Prerogative and Admission to the Bar," XIX ILLINOIS LAW REVIEW 1; In re Day, 181 Ill. 73, 54 N. E. 646, 50 L. R. A. 519; In re Raisch, 83 N. J. Eq. 82, 90 Atl. 12.

<sup>5</sup>"In 1292 the king directed the judges to provide a certain number of attorneys and apprentices to follow the court, who should have the exclusive right of practicing before it. The king considered that one hundred and forty should suffice; but more were to be appointed if there was need. Probably the king did not mean to interfere with the established pleaders. He meant rather that there should be in future some regulation of the 'apprenticii'—the learners who intended to follow the profession of the law. It is quite possible that up to this time these 'apprenticii' had got their training from the serjeants, or the class of practitioners in the royal courts who answered to the serjeants of later days. It is probable that the immediate effect of this ordinance was the making of more systematic arrangements for their legal education; and it is not unlikely that the judges entrusted those who were responsible for giving this education with the duty of selecting those privileged to practice in the courts. . . . The power to appoint an attorney was a privilege to be conceded by royal grant; the appointment must be strictly proved; and in the royal courts an attorney must be appointed by the litigants in court." 2 HOLDSWORTH'S HISTORY OF ENGLISH LAW, 314-315.



courts' exercise of this power to protect, promote and control the profession. The growth of the profession is briefly traced by a leading historian of English Law:

We have seen that in Edward I's reign there were signs that a distinct legal profession was being formed. The pleaders were already a body distinct from the apprentices and the attorneys; and both were becoming subject to fixed rules. Fortescue's book, *De Laudibus Legum Angliae*, shows us that, towards the end of this period, this legal profession has been both formed and organized. At the head of the profession, and exercising a general control over it, were the serjeants-at-law and the judges. Beneath them, grouped together in the four Inns of Court, and in the Inns of Chancery, were the various grades of apprentices of the law, from the Benchers and Readers to the inner Barristers or students. These Inns of Court were colleges which trained the students in the law and called them to the bar. Each had and still in a measure has its independent, its collegiate life; but in all, as nowadays in colleges of the same University, the customs and the system were and are similar. All were in some sort subordinate to the rulings of its visitor or to the statutes of the university. Just as it is the aim of the modern college to fit its members to take the University degree, so it was the aim of the Inns of Court to educate its members to make a creditable figure in the arena of the courts under the eyes of the judges and ultimately to attain to the degree of serjeant and to the dignity of the bench. As college and University are separate entities, and yet closely united, so the judges and serjeants on the one hand, and on the other the apprentices of the law in their Inns, were separate bodies and yet closely welded together by ties of similar education, similar interests, and similar pursuits, into one great profession of the law.<sup>6</sup>

It will be sufficient to say that the governing body was then

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<sup>62</sup> HOLDSWORTH'S HISTORY OF ENGLISH LAW, pp. 484-485. The author makes clear the position of the serjeant-at-law: "By the end of the fourteenth century the serjeants-at-law formed a close body or gild selected by the crown, generally upon the nomination of the judges, from which the ranks of the bench were recruited. . . . The chief justice of the Common pleas, with the consent of all the judges, presented to the chancellor seven or eight names of those, who were reputed to be the best lawyers—men who had been learning and practicing the law for at least sixteen years. The chancellor then sent to them a royal writ commanding them under a heavy penalty, to take upon themselves the degree and state of a serjeant-at-law. . . ."

"The elevation, then, to the dignity of serjeant was the great step forward in the profession. It made the lawyer a member of the great gild which administered the law; and it placed him on an equality with the bench. The serjeants and judges were brothers of the Order of the Coif. To the end they addressed one another as such, and lodged together at the Serjeants' Inns. We are not surprised to find that the creation of a judge was, compared with the creation of a serjeant, an informal affair." *Id.* pp. 485, 486, 489, 492.

as it is now, the Benchers, who possessed powers of education, discipline, and government over the members of the Inns very similar to those possessed by the fellows of an Oxford or Cambridge college. The Benchers were presided over by a member or members of the governing body who were annually elected. Other annually elected members managed the finances of the society; while the Readers, assisted by the Benchers, were, as we shall see, responsible for the education of the members. . . .

The Benchers and Readers are those who have publicly lectured in the Inn. As we have seen, they rule the Society and at their head is the Treasurer or Pensioner. It is from the Readers that the serjeants-at-law are usually appointed. Below them come the Utter-Barristers.

. . . All the residue of learners are called Inner-Barristers which are the youngest men, that for lack of learning and continuance are not able to argue and reason in these motes.<sup>7</sup>

Another writer makes the process of coming to the bar at common law very clear.

The conclusion, then, at which I arrive is this: that authority to call to the Bar was granted by Edward I, with statutory confirmation, to the Judges exclusively, and that the Judges have constituted the Benchers of the Inns of Court their deputies for this purpose. The Benchers call to the Bars of their respective Inns, and the Judges receive at the Bar of the Court without further form or ceremony those whom the Benchers, as their authorized deputies, have called. And this reception by the Judges, without verbal expression, and consisting of nothing more than a tacit permission to a barrister called to the Bar of his Inn by the Benchers of his Inn to appear at the Bar of the Courts unchallenged, seems to have consequences of some technical importance. By long custom we describe ourselves, and are officially and authoritatively described, as barristers-at-law. Now at our call the Benchers of our Inns do not constitute us, nor do they profess to constitute us, barristers-at-law. We are called, as has been noted, only to the Bar of our own Inn—exactly what that may be I must not stop here to consider. How and when, then, do we become barristers-at-law? I take it that it is when we are received by the Judges; and that it is reception by them, in accordance with some long lost or, may be, never formally recorded agreement between them and the Benchers of the Inns of Court, that clothes us with the fuller status. There seems no other means by which it can be acquired. If this be so, the question arises whether a barrister who has never taken his seat in Court, and has, consequently never been received by the Judges, is entitled to describe himself or to be described as anything more than a

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<sup>7</sup>*Id.* pp. 503, 504.

barrister of his own Inn or Court. It may be fairly assumed, however, that since 1868, when the Barristers' Roll was constituted by the Judges, the signing of that roll is accepted by them as a form of reception.<sup>8</sup>

The changes that have taken place in regard to the admission and discipline of barristers are few. The degree of serjeant has been abolished, leaving all barristers of one designation with the exception of the select few appointed King's Counsel. Also strict public examinations have been prescribed under the administration of the Council of Legal Education.<sup>9</sup> The Council of Legal Education consists of twenty benchers, five being chosen by each Inn or Court.<sup>10</sup> The General Council of the Bar, a consultative and advisory body, constituted by regulations by the bar in general meetings, is the accredited representative of the bar. It has no direct power of expulsion or even suspension, but it exerts a very weighty and perhaps controlling influence in all matters pertaining to the bar and the discipline of its members. But a barrister is directly under the control of the benchers of his inn, subject to appeal to the Council of Judges of the High Court.<sup>11</sup>

The rise of professional attorneys and solicitors in chancery, both of which classes are now known as "solicitors,"<sup>12</sup> constitutes a history all of its own. The Justices were directed to examine applicants for admission as attorneys as early at 1402,<sup>13</sup> and the Court of

<sup>8</sup>BOLLAND: "Two Problems in Legal History," 29 LAW QUARTERLY REVIEW 392.

<sup>9</sup>EDWARD S. COX-SINCLAIR, "The Bar of the United States and England," 19 GREEN BAG, 702, 704.

<sup>10</sup>2 HALSBURY'S LAWS OF ENGLAND, p. 364.

<sup>11</sup>2 HALSBURY'S LAWS OF ENGLAND, pp. 368, 369; HAROLD D. HAZELTINE: "Preserving the Professional Ideal in England," 39 REPORTS AMERICAN BAR ASSOCIATION, pp. 912, 916.

<sup>12</sup>13 ENCY. LAWS OF ENGLAND (2nd ed.), p. 437.

<sup>13</sup>EDWARD JENKS: A SHORT HISTORY OF ENGLISH LAW, pp. 201, 202. "These were the three chief classes of members of the Inns; but they were not all the members. In the first place there were the professional attorneys. It is clear that at this period attorneys were rapidly becoming a distinct professional class. The old distinction between the attorney and the pleader was still preserved; and, though unprofessional attorneys were still legally possible, they were coming to be more rarely employed. The increase in the number of professional attorneys made the need for regulating them pressing. It is not therefore surprising to find that attorneys for the purposes of legal business were becoming officers of the court and as such subject to the control of the judges. Thus in 1403 provision was made for the exclusion of ignorant attorneys. They were to be examined by the judges, and those whom the judges admitted were to be enrolled. The judges were also to have the power to remove them. In 1452 the Court of Common Pleas issued orders regulating their conduct. These professional attorneys, thus admitted and controlled by the judges, were, during the earlier part of this period, allowed to plead their clients' cases in courts, and,



Chancery exercised the power of appointment and supervision over solicitors in chancery. The power of admission to and discipline of the solicitors' branch of the profession now rests with the Law Society, judicial powers having been conferred on the Committee of the Society to investigate charges of professional misconduct made against solicitors.<sup>14</sup> This body has no power of its own to strike from the rolls, but it makes reports to the court upon which the court acts, either suspending or excluding the solicitor from practice.<sup>15</sup>

It is the maturity of the English professional system that must be looked at and not the process at any stage of its evolution for the profession had its beginning prior to the time of "pleaders" and "attornies" recognized by royal prerogative and its growth was not completed until it had been subjected to the vicissitudes of centuries of English political disturbances. And whatever else may be said it is perfectly clear that although the profession had its origin and mature development in a country where constitutional divisions of government were unknown, its supervision and control at every stage were handed over to the judges, until by long continued use they came to constitute recognized prerogatives belonging to the judiciary. But more than this, the judges being once assured that the professional standards set up and the machinery provided for maintaining those standards were sufficient, in turn exercised little more than nominal control, leaving to the profession its own control and

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all through this period, to become members of the Inns. They may, perhaps, have been more numerous in the Inns of Chancery than in the Inns of Court; but they might clearly be members of either. They were not yet confined to the Inns of Chancery. In fact, there was as yet no clear division in these respects between the two branches of the profession. Attorneys and junior apprentices were classed together at this period, as in the reign of Edward I.; and no doubt the junior apprentices, both at this period and later, sometimes acted as attorneys. As the old legal distinction between the office of an attorney and the office of a pleader tended to grow more faint with the enlarged powers which litigants had of appointing attorneys, and with the rise of professional attorneys, it might well have happened that the distinction would have been obliterated. But we shall see that the differentiation of duties and functions which was springing up, and the different relation to the judges of these two branches of the profession, tended to supply new ground for their perpetuation of the old distinction; and in the following period, it was revived, and given its modern significance, mainly by the action of the Inns of Court and the judges in first discouraging and then excluding attorneys from call to the bar. The effect was to deny the attorney the right to plead in court for his client because, as we have seen, it was only the call to the bar of the Inn which could confer this right." 2 HOLDSWORTH'S HISTORY OF ENGLISH LAW, p. 504.

<sup>14</sup>13 ENCY. LAWS OF ENGLAND (2nd ed.), pp. 433, 439.

<sup>15</sup>HAROLD D. HAZELTINE: "Preserving the Professional Ideals in England," 39 AM. BAR ASSN. REP. 917. See also T. W. TEMPANY: "The Legal Profession in England," Etc., 19 AM. L. REV. 677, 700.



development.<sup>16</sup> Thus in reality, instead of the judges supervising and controlling the profession, they became merely a part of it. It is due to this close relation between judges, practitioners, teachers, and students and the gradual amalgamation of the four into the legal profession with practical autonomy as a sort of extra-governmental agency that the common law itself was woven into a legal system with a toughness and elasticity of fiber which enabled it to withstand the encroachments of its great rival, the civil law, and to become one of the great world systems of law.<sup>17</sup> No doubt the source of its strength is still to be found in the legal profession. The methods of professional fertilization and control that produced and sustains such a system of laws is worthy of the most careful study.

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When lawyers finally gained recognition as a profession in the American Colonies, their admission and supervision were given over to the courts.<sup>18</sup> Despite the intense distrust and hatred of lawyers as a class, and the opposition both to the courts and the common law, during the period following the Revolution<sup>19</sup> the courts were not deprived of their power of supervision over the bar. After the period of adjustment was over the relations between the courts and the profession were substantially the same as those which obtained in England. The distinctions between branches of the profession had practically dropped out, the requirements for admission were not so standardized, nor the good manners of its members perhaps considered of such importance, yet the same institutional foundation was preserved.

One of the early American cases dealing with the subject of admission arose in New York and involved the constitutionality of an act of the legislature making the diploma of the law school of

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<sup>16</sup>2 HALSBURY'S LAWS OF ENGLAND, p. 360.

<sup>17</sup>"It is during this period that the legal profession organized itself and obtained that monopoly of legal business which it still continues to enjoy. It would be no exaggeration to say that it is this fact which has mainly determined the mode and character of the development of the common law. To the legal profession is due the completion of the system of the mediaeval common law. Its principles were worked out into a detailed system of logical rules by men who were the masters because they were the creators of this technical system." 2 HOLDSWORTH'S HISTORY OF ENGLISH LAW, p. 484; see also pp. 510-512. MAITLAND, "English Law and the Renaissance," 1 SELECT ESSAYS ANGLO-AMERICAN LEGAL HISTORY, 168.

<sup>18</sup>WARREN: HISTORY OF THE AMERICAN BAR, pp. (Va.) 74; (Mass.) 83 et seq.; (Pa.) 109; (S. C.) 121; (N. C.) 123; (Ga.) 126; (Conn.) 130. In New York and New Jersey the governors exercised the power of appointment, pp. 95, 112.

<sup>19</sup>WARREN: HISTORY OF THE AMERICAN BAR, Chap. X.

Columbia College conclusive of the learning and ability of its possessor entitling him to admission to the bar.<sup>20</sup> The Supreme Court refused to admit an applicant under the provision of the statute. The Court of Appeals reversed the order holding the statute valid. The contention was made that the power to admit was vested exclusively in the courts. The court, with all courts, held that admission to the bar is a judicial function.<sup>21</sup>

But, under the peculiar history of that state, in denying the contention it said:

If such an exclusive power is vested in the courts, it must be derived directly from some specific provision or provisions of the Constitution. It cannot be claimed as a part of the inherent power of the courts or as resulting necessarily from their organization as courts.

The court further held:

The legislature has not taken from the court its jurisdiction over the question of admission, but has simply prescribed what shall be *competent evidence* in certain cases upon that question.<sup>22</sup>

The court's decision is probably correct, for in the State of New York the governor prior to the Revolution<sup>23</sup> had exercised for a long time the power of appointing attorneys. Then, while the Constitution of 1777 had expressly given the power of appointment to the courts, the Constitution of 1822 contained no such provision, but provided:

They (the judges) shall not exercise any power of appointment to public office. Any male citizen of the age 21 years, of good moral character, and who possesses the requisite qualifications of learning and ability, shall be entitled to admission to practice in all the courts of this state.

Thus the court had some ground for holding that it was intended

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<sup>20</sup>In the Matter of Application of Henry W. Cooper, 22 N. Y. 67 (1860).

<sup>21</sup>"The lines between the various departments are not and cannot well be very precisely defined, and there are many duties which may be with equal propriety referred to either. Duties of this class, and they are very numerous, necessarily take their character from the departments to which they are respectively assigned. . . . Attorneys and counsellors relate almost exclusively to proceedings of a judicial nature. And hence their appointment may with propriety be entrusted to the courts, and the latter in performing this duty may very justly be considered as engaged in the exercise of their appropriate judicial functions." Pp. 82, 84.

<sup>22</sup>This is one method of committing judicial suicide.

<sup>23</sup>See also *In re Raisch supra*.

to take the matter of admission out of the hand of the courts and turn it over to the legislature. The court said in this connection:

Whenever an applicant is found to possess the requisite qualifications, the Constitution by its own inherent energy appoints, i. e., it gives to the applicant an absolute title to the office, which is equivalent to an appointment.<sup>24</sup>

In *Ex Parte Yale*<sup>25</sup> the Supreme Court of California held that Yale not having taken the oath prescribed by the legislature to be taken by attorneys would not be permitted to practice in that court, saying:

The manner, terms and conditions of their admission to practice, and of their continuing in practice, as well as their powers, duties, and privileges, are proper subjects of legislative control to the same extent, and subject to the same limitations as in the case of any other profession or business that is created or regulated by statute. . . . There is no provision of the Constitution directly restricting the legislature from exercising plenary control over the qualifications, admission, oath or duties of attorneys at law, and in our opinion no such restriction arises by implication, and it therefore follows that the legislature may lawfully require as a condition to their admission to practice or their continuance in practice, the taking of the oath prescribed in the act under consideration, or at their pleasure may dispense with all conditions and oaths.

Dictum to the same effect is found in a similar test-oath case, *Ex Parte Garland*,<sup>26</sup> though the statute involved was held unconstitutional. But such a question is not the same as the one involved in our inquiry as other statements in the opinion of that case indicate. The power to require oaths for officers as well as anyone connected with the administration of the law, or to levy an occupation tax on those who practice law,<sup>27</sup> or to exclude persons from the profession whose unfitness would threaten the public welfare,<sup>28</sup> falls within the police power and does not conflict with the courts' power to prescribe moral and educational standards for those who are permitted to become applicants for admission, and to subject to discipline those

<sup>24</sup>P. 94. The case has been very severely criticised and because of the peculiar history of the matter in this state, has been given little weight. Its general doctrine is apparently contra to the great weight of authority. But see Poffenbarger, dissenting, *In re Application of License to Practice Law* (W. Va.), 67 S. E. 597, 601.

<sup>25</sup>24 Cal. 241, 85 Am. Dec. 62.

<sup>26</sup>4 Wallace 379, 18 L. Ed. 370.

<sup>27</sup>*Ex parte Williams*, 31 Tex. Civ. App. 272, 20 S. W. 580.

<sup>28</sup>*In re Day*, *supra*.

members of the profession who may violate the standards of conduct prescribed for its members.

But the North Carolina court has gone the full length of the doctrine announced by way of dicta in these cases.<sup>29</sup> In construing a statute prescribing certain requirements for applicants it held that the court had no power to inquire into the moral character of an applicant.

We hold . . . that . . . one who complies with the formal prerequisites is entitled to become an applicant and to be examined; and if, on his examination, he shows himself to have competent knowledge of the law, it is the duty of the court to license him; and an investigation into the general moral character of the applicant is no longer required.

Clark, Ch. J., concurring, said:

But this court cannot add to the requirements of the law-making body as to lawyers any more than it can to the requirements for entering upon the practice of medicine or dentistry.<sup>30</sup>

But with this exception the North Carolina court retained its common law power to deal with members of the bar.<sup>31</sup> It is not believed that any other court has gone so far by way of committing itself to the doctrine that the courts are bound by legislation in the matter of admission in the absence of specific constitutional limitation such as the New York Constitution of 1822 was held to impose.

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The theory that the legislature has no power to interfere with the court's prerogative in admitting and disciplining members of the profession has been sustained in a great many cases. The Supreme Court of Illinois, *In re Day*,<sup>32</sup> considered the subject very thoroughly. The legislature had directed the admission of applicants who had done certain study and who held diplomas from certain law schools of that state. The court planting itself squarely upon the division of powers as made by the Constitution and as reinforced

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<sup>29</sup>Re Applicants for License to Practice Law, 143 N. C. 1, 55 S. E. 635, 10 L. R. A. (N. S.), 288.

<sup>30</sup>This is of course palpably unsound. See *In re Bruen*, 102 Wash. 472, 172 Pac. 1152. The two dissenting opinions completely answer the court's extreme position. After this decision the legislature restored the power to the court to pass upon the moral character of applicants. COSTIGAN: CASES ON LEGAL ETHICS, note p. 38.

<sup>31</sup>*State v. Johnson*, 171 N. C. 799, 88 S. E. 437.

<sup>32</sup>181 Ill. 73, 54 N. E. 649, 50 L. R. A. 519.



by the history of the profession held that the legislature stepped beyond its province.<sup>33</sup> It said:

The function of determining whether one who seeks to become an officer of the courts, and to conduct causes therein, is sufficiently acquainted with the rules established by the legislature and the courts governing the rights of parties and under which justice is administered, pertains to the courts themselves. They must decide whether he has sufficient legal learning to enable him to apply those rules to varying conditions of fact, and to bring the facts and law before the court, so that a correct conclusion may be reached. The order of admission is the judgment of the court that he possess the requisite qualifications, under such restrictions and limitations as may be properly imposed by the legislature for the protection and welfare of the public. The fact that the legislature may prescribe the qualifications of doctors, plumbers, horseshoers, and persons following other professions or callings, not connected with the judicial system, and may say what shall be evidence of such qualifications, can have no influence on this question. A license to such persons confers no right to put the judicial power in motion or to participate in judicial proceedings. The attorney is a necessary part of the judicial system, and his vocation is not merely to find persons who are willing to have lawsuits. He is the first one to sit in judgment on every case, and whether the court shall be called upon to act depends on his decision. It is our duty to maintain the provision of the Constitution that no person, or collection of persons, being one of the departments of the government, shall exercise a power properly belonging to another; and if the legislature by inadvertence, as in this case, assumes the exercise of a power belonging to the judicial department, it should only be necessary to call its attention to the restraint imposed by the Constitution.<sup>34</sup>

The views here expressed have found approval in a large number of cases dealing both with questions of admission and disbarment or suspension.<sup>35</sup>

<sup>33</sup>"The powers of the government of this state are divided into three distinct departments,—legislative, executive, and judicial; and no person or collection of persons, being one of these departments, shall exercise any power belonging to either of the others, except as hereinafter expressly directed and permitted." *Supra* n. 32. Compare Art. II, Constitution of Texas.

<sup>34</sup>*In re Day*, *supra* n. 32.

<sup>35</sup>ARIZ.—*McMurchie v. Superior Court*, 221 Pac. 549, 552. "The courts are a co-ordinate branch of the government. Attorneys are officers of the court, and they are at all times accountable to the court for the manner in which they exercise the right and privilege of practicing their profession, and it may at any time declare such right forfeited for misconduct, whether professional or nonprofessional, which indicates an unfitness of the attorney to manage the business of others in the capacity of an attorney. . . . The right to remove

As a sort of practical compromise between the two theories indicated by the cases already considered, some courts have taken a

attorneys for misconduct being necessarily incident to all common law courts of general jurisdiction, is not derived from the legislature. Where there is a statute on the subject, courts may disbar for causes not specified in the statute, which is not to be construed as an enabling act, nor as restricting the general power of the court over its officers."

COLO.—*People v. Irwin*, 152 Pac. 905, 908. "The right to discipline attorneys by suspension or disbarment is inherent in all courts, and has been exercised from the earliest times. . . . That courts have the inherent power of corrective, and that they may, in the exercise of a wise discretion, vary in degree as the circumstances of the case seem to justify, from rebuke to absolute disbarment, appears to be the uniform trend of judicial precedent. The power to admit and remove, suspend or disbar attorneys has been held not to be the subject of statutory regulation, but is exclusively in the province of the courts."

CONN.—*In re Durant*, 80 Conn. 140, 67 Atl. 497, 10 Ann. Cas. 539, 542, "The power to declare this forfeiture is a summary one inherent in the courts, and exists, not to mete out punishment to an offender, but that the administration of justice may be safeguarded and the courts and the public protected from the misconduct or unfitness of those who are licensed to perform the important functions of the legal profession. . . . The action of the court in the exercise of this power is judicial in its character, but the inquiry made is 'in the nature of an investigation by the court into the conduct of one of its own officers, not the trial of an action or suit,' and the order entered is but an exercise of the disciplinary jurisdiction which it has over such officers."

KY.—*Chreste v. Commonwealth*, 171 Ky. 77, 186 S. W. 919, Ann. Cas. 1918E, 122, 132. "In *Com. v. Roe*, 129 Ky. 650, 112 S. W. 683, 19 L. R. A. (N. S.), 413, it was said upon this point: . . . 'The statute points out two of the causes that peremptorily warrant disbarment proceedings, but it does not, and was not designed to, limit the right to the causes mentioned. . . . Courts independent of statutes have at all times possessed the inherent right to control and regulate the official conduct of their officers, and to inflict upon them punishment for official misconduct. Attorneys at law are officers of the court, and it has always been the rule in this state that, when the attention of the court in which they practice was called to acts of professional misconduct, it had the right to disbar them if the facts of the case justified the infliction of this punishment.' To the same effect is *Lenihan v. Commonwealth*, 165 Ky. 93, 176 S. W. 948, L. R. A. 1917B, 1132."

MASS.—*In re Carver*, 224 Mass. 169, 172, 112 N. E. 877, 879. "An attorney is an officer of the court, exercising a privilege of franchise during good behavior. The court has power, not only under R. L. c. 165, Sec. 44, but inherently, to suspend or remove him from his office as an attorney in the courts, upon good cause shown and after proper judicial proceedings."

MO.—*In re Sizer*, 300 Mo. 369, 377, 254 S. W. 82, 83. "We have repeatedly held that this court has inherent power and jurisdiction to disbar attorneys from practicing law for the commission of acts in violation of their professional duty."

OHIO.—*In re Thatcher*, 80 Ohio St. 492, 89 N. E. 39, 84. "Numerous authorities, English, Federal, and State, assert such jurisdiction as inherent in every court of record as a necessary incident of its organization as a court, and that it especially, although not exclusively, results from the power to admit to the bar, and that such original jurisdiction exists even in courts of appellate jurisdiction. . . . The power to discipline attorneys, who are officers of the court, is an inherent and incidental power in courts of record, and one which is essential to an orderly discharge of judicial functions. To deny its existence is equivalent to a declaration that the conduct of attorneys towards courts and clients is not subject to

middle ground recognizing a sort of dual jurisdiction, holding generally that while the power of admission and discipline is judicial,

restraint. Such a view is without support in any respectable authority, and cannot be tolerated."

OKLA.—*Williams v. Sullivan*, 35 Okla. 745, 131 Pac. 703, L. R. A. 1915D, 1218, 1223. "The supreme court of this state has exclusive power to admit attorneys to practice law before it and in the inferior courts of the state; and, this being true, it has, independent and aside from the statutory grounds of disbarment, the inherent power to suspend or disbar attorneys."

But in *re Saddler*, 35 Okla. 510, 130 Pac. 906, 44 L. R. A. (N. S.), 1195, the Supreme Court of Oklahoma while recognizing this rule, held that a statute prohibiting the court from disbarring an attorney for conduct disconnected with his professional conduct until after he had been convicted thereof, was not unconstitutional. But see *Ex parte Wall*, 107 U. S. 265, 27 L. Ed. 552, 2 Sup. Ct. 569.

N. M.—*Wood v. Reynolds*, 22 N. M. 1, 158 Pac. 413, 417. "The right to suspend or disbar being an inherent right in the courts, it would follow that the legislature is without power to destroy or abridge this right. We therefore are of the opinion that, notwithstanding the statutory provisions on the subject, the district court had the power to suspend the relator from practicing law in the courts of the Second Judicial District until the further order of the court, pending a hearing and determination in this court of the question as to whether or not the relator should be permanently disbarred from practice."

PA.—In *re Splane*, 123 Pa. 527, 16 Atl. 481, 483. "No judge is bound to admit, or can be compelled to admit, a person to practice law who is not properly qualified, or whose moral character is bad. The profession of the law is one of the highest and noblest in the world. The relation between attorney and client is a very close one, and often involves matters of great delicacy. The attorney is an officer of the court, and is brought into close and intimate relations with the court. Whether he shall be admitted, or whether he shall be disbarred, is a judicial, and not a legislative, question."

S. D.—*Dansforth v. Egan*, 23 S. D. 43, 119 N. W. 1021, 20 Ann. Cas. 418. "Did the framers of the constitution intend to indirectly take from the courts, in favor of a certain excepted class of persons, a right which the statutes of the territory had recognized as resting in the courts—a right recognized for centuries, by all countries and states having laws based on the English common law, as the inherent right of the court, a right necessary in the very nature of courts and the duties devolving upon them, a right which, if lost, would soon bring the courts of our land into contempt—the right to say who shall as attorneys be recognized as officers of the courts, together with the right to expel such persons whenever they have been adjudged unworthy or unfit for this important trust? This right of the courts is as much the law of our land, and of as much dignity as such as any law found in the constitution or statutes. It is not dependent upon either the constitution or statutes for its existence, but exists fully in all courts of record unless expressly restricted or taken away by legislation, and it is a serious question whether it lies within the power of the legislature to more than regulate this right of the court, whether the legislature can more than prescribe certain qualifications for admission, leaving to the proper court to fix others if it sees fit, and whether the legislature can more than fix certain grounds for disbarment, leaving to the court the right to disbar for other reasons within sound judicial discretion. 3 Am. & Eng. Ency. of Law (2d Ed.), 287, 300, 301; 4 Cyc. 900."

UTAH.—In *re Platz*, 42 Utah 439, 443-4, 132 Pac. 390, 392. "Nor can the legislature limit the courts in their right to determine the moral qualifications of their officers or prevent them from refusing to admit morally incompetent persons to practice, nor compel them to retain such upon the roll. If such were the law, then the verdicts of juries or the notions of prosecutors or legislators, and not the



yet the legislature may prescribe reasonable regulations which the courts will acquiesce in, largely as a matter of courtesy to a co-ordinate branch of the government. A Kansas case<sup>36</sup> indicates this view, although the courts differ somewhat in their statements of the doctrine. The court said:

A practicing attorney is an officer of the court in which he is admitted to practice. The power to admit applicants to practice law is judicial, and not legislative, and is, of course, vested in the courts only. 4 Cyc. 900. The act of admission is a judicial determination, and is not for a term of years, but for life, or until the attorney shall have been disbarred by a court of competent jurisdiction. It is generally conceded, however, that it is competent for the legislature to prescribe the qualifications for admission and the grounds for disbarment, as well as the procedure therein. It is not within the power of the legislature, however, to admit an attorney to practice in the courts of the state or to disbar a practicing lawyer. *Ex Parte Secombe*, 19 How. 9, 15 L. Ed. 565; *In Re Day*, 181 Ill. 73, Syl. 6, 54 N. E. 646, 50 L. R. A. 519; *Garrigus v. State Ex Rel.*

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deliberate judgments of the courts, would control in such matters. The courts, and not juries or legislators, must ultimately determine the qualifications and fitness of their officers."

In *re Evans*, 42 Utah 282, 300, 130 Pac. 217, 225. "The summary jurisdiction which the court has over its attorneys as officers of the court is also invoked. That jurisdiction is inherent, continuing, and plenary, and exists independently of statute or rules of equity, and ought to be assumed and exercised as the exigencies and necessity of the case require, not only to maintain and protect the integrity and dignity of the court, to secure obedience to its rules and process, and to rebuke interference with the conduct of its business, but also to control and protect its officers, including attorneys."

VA.—*Legal Club v. Light*, 137 Va. 249, 119 S. E. 55. "Independent of statutory authority, all courts of record in Virginia have inherent power in a proper case to suspend or annul the license of an attorney practicing in the particular court which pronounces the sentence of disbarment. The power to go further and make the suspension or revocation of license effective in all other courts of the commonwealth must be conferred by statute. *Fisher's Case*, 6 Leigh (33 Va.), 619. This inherent power, as to the Supreme Court of Appeals, is not abridged by Section 88 of the Constitution limiting the original jurisdiction of that court to cases of habeas corpus, mandamus, and prohibition. Such power does not depend for its existence upon either constitutional or statutory provision, but is possessed by all courts of record, unless taken away by express constitutional (or possibly legislative) inhibition. *Dansforth v. Egan*, 23 S. D. 43, 119 N. W. 1021, 139 Am. St. Rep. 1030, 1033, 20 Ann. Cas. 418. The legislature in Virginia, far from undertaking to deprive the courts of the power in question, has expressly recognized it in Sections 3423 and 3424 of the Code."

GENERALLY.—*Wernimont v. State*, 101 Ark. 210, 142 S. W. 194, Ann. Cas. 1913D, 1156; *In re Application to Practice Law*, 67 W. Va. 213, 67 S. E. 597; *In re Adkins*, 83 W. Va. 673, 98 S. E. 888; *In re Godell*, 39 Wis. 232, 20 Am. Rep. 42; *In re Mosness*, 39 Wis. 509, 20 Am. Rep. 55; COOLEY, CONSTITUTIONAL LIMITATIONS (5th Ed.), p. 411; 6 C. J., pp. 571-572; 580-581; note to *Burns v. Allen*, 2 Am. St. Rep. 847.

<sup>36</sup>*Hanson v. Grattan*, 84 Kan. 843, 115 Pac. 646.



*Moreland, Auditor*, 93 Ind. 239, 242. Originally the courts alone determined the qualifications of candidates for admission, but, to avoid friction between the departments of government, the courts of this and other states have generally acquiesced in all reasonable provisions relating to qualifications enacted by the legislature.<sup>37</sup>

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<sup>37</sup>Excerpts from other cases found in the note sufficiently indicate the trend of judicial thought supporting this view:

IND.—*Re Leach*, 134 Ind. 665, 34 N. E. 641, 642, 21 L. R. A. 701, 706. "Under our constitution, judicial power is vested in the courts, and as attorneys are officers of the court, and owe to the court admitting them a proper degree of rectitude, the power exists as one of the inherent privileges of the court, and as necessarily incident to its control over the membership of its bar, to prescribe all reasonable rules for the admission of persons desiring to practice, such rules of course not conflicting with the constitution and laws of the state." In this state the constitution forbids any examination as to legal attainments. But the legislature has placed the power of admission in the courts.

N. J.—*In re Raisch*, 83 N. J. Eq. 82, 97, 90 Atl. 12, 19. "The power of every court to discipline its attorneys or solicitors or proctors, its subordinate officers whose word so vitally affects the administration of justice, is universally recognized. That all courts have this power in the absence of express statutory limitations is a general principle of English and American jurisprudence." In this state the nominal appointment of attorneys and counsellors has always been made by the governor.

ORE.—*State v. Woernle*, 109 Ore. 461, 209 Pac. 604, 605. "It is made the duty of the Supreme Court to disbar any member of the bar of this state upon proper proceedings for that purpose, ' . . . whenever it shall appear to that court that his conduct has been such that if he were then applying for admission to the bar his application should be denied.' Section 1091, Ore. L. . . The above section of the Code is a statutory declaration of the power inherent in every court to strike the name of an attorney from its roll, who has been guilty of conduct or acts committed inside or outside of his professional employment, which show him to be corrupt, dishonest, or untrustworthy."

WASH.—*In re Bruen*, 102 Wash. 472, 476, 477, 480, 172 Pac. 1152, 1153, 1154, 1155. "The inherent power of the court is the power to protect itself; the power to administer justice whether any previous form of remedy had been granted or not; the power to promulgate rules for its practice; and the power to provide process where none exists. It is true that the judicial power of this court was created by the constitution, but upon coming into being under the constitution, this court came into being with inherent powers. Among the inherent powers is the power to admit to practice, and necessarily therefrom the power to disbar from practice, attorneys at law. Formerly attorneys were admitted in various courts. The legislature, with a view of bringing about uniformity in the requirements and standards for admission of attorneys, conferred the whole matter of admission of attorneys upon this court, and this court is the only court entitled to admit and enroll attorneys in the State of Washington. . . . The legislative power in the interest of uniformity of standard and to remedy and prevent mischiefs in the profession may regulate and restrict this power, but cannot take it away. It may provide machinery for the administration of the regulation provided by the legislature, as in carrying into effect such regulations some agency is necessary. In this instance it has provided the machinery and agency of the state board of law examiners. . . . Having the sole and exclusive power in such matter, not prohibited by any constitutional provision, and not infringing in any way upon any legislation of the state except that part of Chapter 115 last discussed, the legislature provided an intermediary agency, whereby the

The soundness of this doctrine has no doubt escaped strict examination, first, because it presents a practical solution of a difficult problem; second, because the courts have had very little cause to question the legislative power to make such regulations. Legislatures usually have merely put into statutory form the general rules and regulations that have been worked out by the courts during the period of the profession's growth.<sup>38</sup> If they go any further it is to put into effect some plan for professional control worked out by the profession itself (usually the bar association in consultation with the judges), and hence wholly acceptable both to the courts and to the profession. Moreover, such legislation has seldom been considered restrictive, but has permitted the courts to go as much further as they have thought desirable. Thus it may be going too far to say that the courts have compromised their power when the legislatures have done nothing more than to prescribe what the courts themselves would require. At any rate, despite what the courts may claim as to their exclusive power, the fact remains that the legislatures of perhaps all jurisdictions have legislated on the subject and some deference at least has been given such legislation by the courts in all such instances. Practically all the courts, however, assert their independence of unreasonable regulations

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power of the court could be more generally and efficiently exercised. To that extent the legislation was warranted and valuable. The invalid portion is manifestly separable from the valid portions of the act, which may therefore be sustained."

W. VA.—*In re Application for License to Practice Law*, 67 W. Va. 213, 67 S. E. 597, 599. "With scarcely an exception it has been held that both in the admission to and suspension from practice of the law, courts act judicially in the exercise of an inherent power, and not in a mere administrative or ministerial capacity, and in the execution of the will of some other branch of the government. . . . But notwithstanding the jurisdiction of the courts over the subject it has been generally conceded that the legislature may in the exercise of its police power, prescribe reasonable rules and regulations for admission to the bar, which will be followed by the courts. But the legislature may not impose unreasonable rules or deprive the courts of their inherent power to prescribe other rules and conditions of admission to practice."

*In re Adkins*, 83 W. Va. 673, 98 S. E. 888, the court held a joint resolution requiring the court to grant licenses to certain persons to practice law to be of no force as it constituted a backward step in the promotion of the bar's interest and was unreasonable.

Wis.—*Vernon County Bar Association v. McKibbin*, 153 Wis. 350, 354, 141 N. W. 283, 284. "There is no question but that the legislature has power to regulate admission to the bar by prescribing a standard therefor, and it is the duty, as it should be the pleasure, of the court to give full effect to all reasonable efforts in that regard." This case marks a considerable weakening in this court's attitude from that indicated in *Matter of Godell*, 39 Wis. 232, 20 Am. Rep. 42, and *Matter of Mossness*, 39 Wis. 509, 20 Am. Rep. 55.

<sup>38</sup>See *Legal Club v. Light*, 137 Va. 249, 119 S. E. 55; *State v. Woerndlé*, 109 Ore. 461, 209 Pac. 604.

and restrictions upon their power. After all, there is not such a wide difference between the actual operation of the several theories; legislative interference or attempt at interference has been more apparent than real. While the tendency of all robust, democratic legislatures is to cover the whole ground, and to leave no subject untouched, as a practical matter all they have done in this instance is to hand over to the courts what already belonged to them. Perhaps without realizing it, they have done just what king and parliament did in the early history of the profession—the only sensible and natural thing to do. In this way law-making bodies have no doubt proved valuable allies to the courts, inasmuch as legislative sanction satisfies the popular conception of democratic government. Whatever else may be said, the courts of most jurisdictions, under any theory of their power, are in a position to control admission to the profession as well as to exercise disciplinary measures over its members to enforce its standards.

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There are no decisions by Texas courts involving the respective powers of the judiciary and legislature to deal with the profession; especially none on the subjects of admission and discipline. Under the government of Coahuila and Texas it seems that the governor was authorized provisionally to grant admission.<sup>39</sup> Later the Congress seems to have made provision for admission.<sup>40</sup> It is assumed that the Congress had sole power to make such regulations as it saw fit.<sup>41</sup> The Constitution of the Republic of Texas provided that the government should be divided into three departments, legislative, executive, and judicial, and that "Congress shall have power . . . to make all laws which shall be deemed necessary and proper to carry into effect the foregoing express grants of power and *all other* powers vested in the government of the Republic or in any

<sup>39</sup>"Until the manner and terms (are prescribed) whereby the Counsellors at Law of the state are to be admitted and qualified, the executive shall permit those who apply to him to exercise their profession, exacting of them their lawful diploma, and authenticated certificate that they are not suspended in the practice of their profession. . . . Given in Saltillo on the 14th of October, 1826." Decree No. 26, p. 43, Laws and Decrees of Coahuila and Texas.

<sup>40</sup>The examination of Thomas Jefferson Chambers, as provided by decree of the 22nd of September, 1830, is hereby dispensed with; in pursuance thereof he is authorized to practice as counsellor in the state by sole virtue of the diploma and credentials he has presented. . . . Decree No. 245, p. 226, Laws and Decrees of Coahuila and Texas.

<sup>41</sup>Arts 97, 172, Constitution of the State of Coahuila and Texas, 1827.



officer or department thereof.”<sup>42</sup> The Third Congress of the Republic passed an act regulating the license and practice of attorneys.<sup>43</sup> This act provided for licensing applicants by the district judge or chief justice of the Supreme Court during vacation on proof of good moral character and the requisite age, the court being satisfied with the legal attainments shown. But such license should expire at the next term of court, at which time the judge should appoint three distinguished lawyers, who should in open court examine the applicant, license to be granted by the court if they were satisfied as to the applicant’s legal attainments. Provision was also made for revocation of an attorney’s license by the court if he were convicted of felony, and of suspending him or striking his name from the roll at the discretion of the court if guilty of malpractice or misdemeanor.<sup>44</sup>

The Constitution of the State of Texas adopted in 1845 provided for a division of government into three departments with this significant clause: “and no person or collection of persons, being of one of these departments, shall exercise *any* power properly attached to either of the others, except in the instances herein expressly permitted.”<sup>45</sup> No such sweeping provision giving to the legislature the power to make laws as contained in the Constitution of the Republic is to be found in any subsequent Texas Constitution. Nor is there to be found in either the Constitution of 1845 or the present one any provision specifically assigning professional supervision to any of the three branches of the government. While the Act of Congress of the Republic was clearly within its province in prescribing the regulations of 1839 as noted above, the same could hardly be justified under the first Constitution of the State. Nevertheless, the first legislature of the state passed an act to regulate the license and practice of attorneys and counsellors at law,<sup>46</sup> in all essential details the same as the Act of the Congress of the Republic. It left the matter of admission to the courts in vacation and to a committee of lawyers appointed by the court in term time.

<sup>42</sup>Art. I, Sec. 1, and Art. II, Sec. 7, Vol. 1, GAMMEL’S LAWS OF TEXAS, pp. 1069, 1073.

<sup>43</sup>Approved Jan. 26, 1839, 2 GAMMEL’S LAWS OF TEXAS, p. 136.

<sup>44</sup>It was further enacted “that all the rules and regulations established by the supreme and district courts for their own government and for the control of attorneys in their practice, not contrary to law, shall have the force and effect of law,” provided they were published as required. There were other provisions not here necessary to notice.

<sup>45</sup>2 GAMMEL’S LAWS OF TEXAS, p. 1279. This provision is the same as Art. II of the present constitution.

<sup>46</sup>2 GAMMEL’S LAWS OF TEXAS, p. 1551, approved May 12, 1846.



It broadened the grounds of disbarment for conviction of felony, naming "bribery, perjury, forgery, larceny or other felony, or treason against the state or the United States," and provided that *any* court of record might exercise this power. But prior conviction was essential.<sup>47</sup> Provision was added for institution of the proceeding by motion or information of any two or more practicing attorneys and for giving the party defendant at least five days notice before the trial. The provision of the prior act as to rules promulgated by the courts was dropped. Under this act at least one attorney was disbarred by the court.<sup>48</sup>

The Fifth Legislature passed certain amendments not material here except that provision was made that in cases of contempt of court under Section 10 of the Act of 1846, defendant should have the right of trial by jury.<sup>49</sup> In *Jackson v. State*,<sup>50</sup> a defendant was proceeded against under this section for charging a judge who was a candidate for re-election with dishonesty and corruption. The charges as dealt with were considered as contempt of court and malpractice. The jury returned a special verdict that defendant made the statements attributed to him. On appeal the Supreme Court held that on the contempt charge defendant could not be held since his conduct was personal instead of professional as required by the statute.<sup>51</sup> On the charge of malpractice, the court held that the special verdict was not sufficient, but that outside the verdict there was nothing in the record to support the judgment. The first attempt to use the jury in a contempt case is thus inconclusive. The court's discussion of the general subject, however, is pertinent:

In the absence of special provision to the contrary, the power of removal is, from its nature, commensurate with the power of appointment; and it has accordingly been everywhere held to be the province of the judges to withdraw the privileges of attorneys where they abuse those privileges. *Austin's Case*, 5 Rawle 191-203; *Dillon v. The State*, 6 Tex. 55; Bac. Abr. tit. Attorney; *Smith v. The State*, 6 Yerg. 228.

The end to be attained by removal, it is said, is not punishment for contempt, as in the cases mentioned in the fifth

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<sup>47</sup>*State v. Robinson*, 26 Texas 367, 371.

<sup>48</sup>*Dillon v. State*, 6 Tex. 55.

<sup>49</sup>3 GAMMEL'S LAWS OF TEXAS, p. 1562.

<sup>50</sup>21 Tex. 668.

<sup>51</sup>Applying opprobrious and abusive epithets to the judge, in vacation, cannot be considered "a contempt involving fraudulent or dishonorable conduct or malpractice" within the meaning of the statute.

section of the statute before referred to. It is one thing to remove from office for unfitness, and another to punish for contempt. Id. The Act of 1854 embraces both classes of cases; and doubtless both may be proceeded upon together and may indeed be inseparable in many cases. But there is no necessary connection between a contempt of court and malpractice.

The Eighth Legislature amended the Act of 1854 in so far as the latter act amended Section 10 of the Act of 1846 by providing:

Each attorney and counsellor at law shall be subject to fine or imprisonment by any court in which he may practice for misbehavior, or contempt offered to such court; but no court shall strike an attorney and counsellor at law from the rolls, for contempt, unless it involve fraudulent or dishonorable conduct, or malpractice, in which case, proceedings may be had as directed in the preceding section; and any attorney or counsellor at law who may be charged with fraudulent or dishonorable conduct, or malpractice in the district court shall have the right to a trial by jury, should he demand it.<sup>52</sup>

The amendment did not authorize jury trials except in this particular class of cases and did not make jury trials applicable to cases other than those of contempt of court by reason of such conduct.

In *Casey v. The State*,<sup>53</sup> the court in holding that there was no appeal from an order fining appellant for contempt said:

It will be observed that the only case of contempt in which the statute gives the right of appeal is where the malpractice involves fraudulent or dishonorable conduct, or malpractice on the part of an attorney, and where the district court pronounces judgment striking the attorney from the roll. The district court has no authority to strike an attorney from the roll for contempt merely. It can only be done where the contempt involves malpractice or fraudulent or dishonorable conduct. . . .

It also contended in this case that a fine imposed upon an attorney for contempt of court should be distinguished from an ordinary case of a fine for contempt, because the statute of 1854 gives the attorney the right to a trial by jury with the privilege of pleading as in a case of misdemeanor. . . .

The right to appeal to a jury was probably given to attorneys in these cases, because, from the nature of the duties of attorneys, and from the relations which they sustain to each other and to the presiding judge of the court, there is a greater probability that they will be betrayed into indiscretions which

<sup>52</sup>4 GAMMEL'S LAWS OF TEXAS, p. 1385.

<sup>53</sup>25 Tex. 380, 381.

might be taken to be contempts of court than that the same things will be done by other persons. . . . *And it is with much satisfaction we notice that the Legislature, at its last session, amended the Act of 1854 so as to take away from attorneys the right to appeal to a jury in ordinary cases of contempt, securing the right of trial by jury only where the inquiry involves the malpractice, or fraudulent or dishonorable conduct for which an attorney may be stricken from the roll.* This is to restore to the judges that proper measure of power which is indispensable to the maintenance of judicial authority.

Except for making provision for admission to practice in appellate courts<sup>54</sup> of attorneys licensed by the district court, the statutes were not again changed until the revision of 1879.<sup>55</sup> Just what the codifying commission did is not clear. The commissioners reported as follows: "The laws relating to attorneys have been retained with very little change beyond the following amendments and additions, viz.: 1. In Arts. 229, 230, 231, 232, and 233, the mode of proceedings against the trial of an attorney for the purpose of revoking or suspending his license is plainly and fully stated."<sup>56</sup> The provisions as to admission were kept intact. The provisions for disbarment were retained but their order was so changed that it might be well contended that a jury trial was provided for all such cases except in cases of conviction of felony.<sup>57</sup> Clearly no jury trial was provided in such case. The provision for fining or imprisoning for contempt was retained with the proviso: "no attorney shall be suspended or stricken from the rolls for contempt unless it involve fraudulent or dishonorable conduct of malpractice."<sup>58</sup> Article 228 is taken out of its setting as the amendment of 1860,<sup>59</sup> and together with Article 229, which is new, seems to have been intended to cover all other disbarment cases which might fall under the head of "fraudulent or dishonorable conduct or malpractice, or of contempt involving fraudulent or dishonorable conduct or malpractice." The text of these articles is set out in the note.<sup>60</sup>

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<sup>54</sup>Act of April 18, 1873, p. 39.

<sup>55</sup>See Arts. 221 et seq. R. S. 1879.

<sup>56</sup>Vol. II, SAYLE'S TEXAS CIVIL STATUTES.

<sup>57</sup>Art. 226, R. S. 1879.

<sup>58</sup>Art. 227, R. S. 1879.

<sup>59</sup>*Supra*.

<sup>60</sup>Art. 228.—Any attorney at law who shall be guilty of any fraudulent or dishonorable conduct, or of any malpractice, or of contempt, involving fraudulent or dishonorable conduct or malpractice, may be suspended or his license may be

By this rearrangement of sections it may have been intended, and the language would so indicate, that the right of jury trial was extended much farther than simply to cases of "*contempt* involving fraudulent or dishonorable conduct or malpractice" as a cause for disbarment. If so, a very decided innovation was made in such proceedings.

The revision of 1879 was carried forward in the revision of 1895<sup>61</sup> except that Article 257 was added by Act of 1891<sup>62</sup> providing for the admission of graduates of the law department of The University of Texas, apparently without examination as to their legal attainments.<sup>63</sup> The acts of the legislature in 1897,<sup>64</sup> 1903,<sup>65</sup> and 1905,<sup>66</sup> as brought forward in the revision of 1911,<sup>67</sup> made material changes in the procedure for admission. The several Courts of Civil Appeals were directed to appoint a board of legal examiners every two years for their respective districts and these boards were empowered to examine applicants, and issue licenses under seal of the court, if the applicant should make certain grades and give satisfactory evidence of good moral character and deportment. Graduates of the law school of the University were exempted from examination. The legislature further directed the Supreme Court to prescribe a course of study to be followed by applicants. The provisions pertaining to disbarment were not

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revoked by the district court of the county in which such attorney resides or of the county where such conduct or malpractice occurred in manner *and form as hereinafter provided*.

Art. 229.—If any district court observes any fraudulent or dishonorable conduct or malpractice by any attorney at law, or if complaint be made to the district court of such conduct or malpractice by a judge of any court, a practicing attorney, a county commissioner or justice of the peace, such court shall order the attorney to be cited to show why his license shall not be suspended or revoked.

Art. 230.—(Provides for form of complaint.)

Art. 231.—(Provides for citation and time of service.)

Art. 232.—Upon the return of said citation executed, if the defendant appear and deny the charge, the cause shall be docketed for trial and conducted in the name of the State of Texas against the defendant, and the state shall be represented by the county or district attorney. A jury of twelve men shall be impaneled unless waived by the defendant, and the cause shall be tried in like manner as other cases.

Art. 233.—(Provides for judgment of suspension or revocation.)

<sup>61</sup>R. S. 1895, Arts. 255 et seq.

<sup>62</sup>P. 23.

<sup>63</sup>Art. 257, R. S. 1895.

<sup>64</sup>P. 17.

<sup>65</sup>P. 60.

<sup>66</sup>P. 150.

<sup>67</sup>R. S. 1911, Art. 309 et. seq.



changed except an article was added dealing with barratry.<sup>68</sup> This article expressly makes the procedure under it the same as that provided for dishonorable conduct or malpractice, and it is to be assumed that it was thought that such called for a jury trial. It no doubt represents the legislature's interpretation of the revision of 1879 and succeeding revisions.

No further change in the statutes pertaining to attorneys was made until 1919,<sup>69</sup> when very radical departures were made in the procedure governing admissions. The revision of 1925<sup>70</sup> carries forward the material features of that act, and together with the Act of 1921<sup>71</sup> perhaps materially changes the methods of disbarment.<sup>72</sup>

After nearly a century of piecemeal legislation, the two problems are still open in this jurisdiction. First, what is the courts'

<sup>68</sup>Art. 331, R. S. 1911.

<sup>69</sup>Act 1919, Ch. 38.

<sup>70</sup>R. S. 1925, Arts. 304 et seq.

<sup>71</sup>Act 1921, p. 137.

<sup>72</sup>Art. 311.—No person convicted of a felony shall receive license as an attorney at law, or, if licensed, any court of record in which such person may practice shall, on proof of a conviction of any felony, revoke his license, and strike his name from the roll of attorneys. (Acts 1846, p. 247; G. L., Vol. 2, p. 1553.)

Art. 312.—An attorney at law may be fined or imprisoned by any court for misbehavior or for contempt of such court. No attorney shall be suspended or stricken from the rolls for contempt unless it involve fraudulent or dishonorable misconduct or malpractice. (Acts 1860 p. 23; G. L. Vol. 4, p. 1385.)

Art. 313.—Any attorney at law who shall be guilty of barratry or any fraudulent or dishonorable conduct or malpractice may be suspended from practice, or his license may be revoked by the district court of the county in which such attorney resides or where the act complained of occurred, regardless of the fact that such act may constitute an offense under the Penal Code of Texas, and regardless of whether he is being prosecuted or has been convicted for the violation of such penal provision. (Acts 1921, p. 137.)

Art. 314.—The judge of any court, a practicing attorney, a county commissioner or justice of the peace may file with the clerk of the district court a sworn complaint of fraudulent or dishonorable conduct or malpractice on the part of any attorney at law.

Art. 315.—Upon the filing of such complaint, or upon its own observance of such conduct, such district court shall order the attorney to be cited to show cause why his license shall not be suspended or revoked. If the citation be ordered upon the observation of the court, the charge and the grounds thereof shall be set out distinctly in the order of the court. Such citation shall be served upon defendant at least five days before the trial day.

Art. 216.—Upon the return of said citation executed, if the defendant appear and deny the charge, the cause shall be docketed for trial and conducted in the name of the State of Texas against the defendant. The county or district attorney shall represent the State. A jury of twelve men shall be impaneled unless waived by the defendant. If the attorney be found guilty, or if he fail to appear and deny the charge after being duly cited, the said court, by proper order entered on the minutes, may suspend his license for a time, or revoke it entirely and may also give proper judgment for costs.

power over admission to the bar in this state? Second, what is the status of disciplinary procedure?

The second will be considered first. These are some of the more important questions: (1) Is the legislation on our books intended to be comprehensive; (2) has no court save the district court jurisdiction to discipline members of the bar for such conduct as mentioned in Article 313; (3) may no person except the ones named in Article 314 make complaint; (4) is a jury trial demandable in every case, except as provided in Article 311?

Answered on the basis of the history of the subject and the attitude taken by the courts of other jurisdictions towards such legislation, and in the light of the review made of the fragmentary acts of the legislature it would seem clear that the statutes are partial in their scope and not intended to be exclusive. Moreover, if such legislation be considered as comprehensive, it would be restrictive of the inherent powers of the judicial branch of the government.

Are the Supreme Court, Court of Criminal Appeals, the Courts of Civil Appeals, all courts of record and general jurisdiction, powerless to discipline attorneys who are guilty of barratry, fraudulent or dishonorable conduct or malpractice in their practice before those courts? Perhaps the legislature intended no such impoverishment of the inherent power of a coördinate department of government. While the legislature has given the district court jurisdiction of disbarment proceedings generally, it would seem that the Supreme Court by virtue of its power to admit to the bar would have a like power to disbar, and all other courts of record and general jurisdiction may at least exercise disciplinary control over those who practice before them.<sup>73</sup> May not a citizen other than those named in Article 314 make complaint of an attorney's conduct? May not any other officer do so? Clearly the statute is neither all exclusive nor all inclusive. The language of the statute requires no such strict interpretation, and to so hold would reflect both upon the intelligence and good taste, to say nothing of the good judgment, of the law-making branch of our government. This legislation, it would seem, furnishes only a partial basis for professional discipline, a special procedure, which the courts may regard or disregard as they see fit, being governed at all times wholly by the reasonableness of the requirement both as to standards and procedure.

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<sup>73</sup>See notes 4 A. & E. Ann. Cas. 990; 15 A. & E. Ann. Cas. 419. If there is any doubt about this it should be made clear by early legislation.

Is a jury trial a matter of right in such proceeding? If the conclusion that the legislature has only prescribed a partial and special procedure be correct, clearly the provision for jury trial partakes of that nature also. This view is borne out by the provision for disbarment of one convicted of a felony,<sup>74</sup> to which a jury trial has never been applicable and is not now. Moreover, "any court of record in which such person may practice" may revoke his license. Likewise, in proceeding against an attorney for retaining his client's money<sup>75</sup> a jury trial has never been provided.<sup>76</sup> As already detailed, it is but by way of legislative accident that the provision for jury trial in contempt cases by the amendments of 1854 and 1860 was made to cover other grounds for disbarment, if it in fact does. No doubt the commission of 1879 were struck by the seeming lack of clearness in the statutes and amendments and being commendably desirous of making the statutes clear, brought in this innovation without realizing the narrow scope of its original application. This revision furnished the pattern for subsequent ones.

Under the present reading of the statutes, however, this provision seems to cover the large number of such cases which would ordinarily arise and if this regulation is a valid one, it is a serious matter to the profession. If the standards and discipline of the profession are to be governed by laymen standards and ideals then lawyers can hardly continue to call themselves members of a profession.

The seriousness of the situation is further emphasized by the belief on the part of some excellent lawyers that the right to jury trial has become a matter of constitutional guaranty and that the matter cannot longer be dealt with as a legislative subject. This view is based upon the constitutional provision: "The right of trial by jury shall remain inviolate."<sup>77</sup> The argument is this: the right of trial by jury was provided in such cases before the Constitution of 1876 was adopted, hence its adoption with this provision carried forward this statute as a constitutional guarantee.<sup>78</sup> This is a circuitous route by which to obtain constitutional inhibition on legislative action but it deserves attention. The idea finds some support in *White v. White*.<sup>79</sup>

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<sup>74</sup>Art. 311, R. S. 1925.

<sup>75</sup>Art. 317, R. S. 1925.

<sup>76</sup>See *Balogh v. Jackson*, 272 Pa. St. 482, 116 Atl. 377.

<sup>77</sup>Sec. 15, Art. I, CONSTITUTION OF TEXAS.

<sup>78</sup>See Report of Special Committee, TEXAS BAR ASSOCIATION PROCEEDINGS, 44th Annual Meeting, pp. 74-84.

<sup>79</sup>108 Tex. 570, 196 S. W. 508, L. R. A. 1918A, 339.

There are several answers, however, to this contention. As has already been shown, this provision except as to disbarment proceedings for contempt, never became a part of the statutory regulations on this subject until the revision of 1879, a date subsequent to the adoption of the present constitution. This exception alone if guaranteed by constitutional provision would have no practical or serious inhibition on the legislature's power to repeal that part of the statute which is of such serious moment.

But the most important ground on which such contention is met is that any such statute is either void as an impingement on the judicial prerogative, or because it is an unreasonable attempt by the legislature to regulate and control matters pertaining to the judicial department of the government. Under either view, if the statute was void from the beginning, the right of jury trial would not have been carried forward by the Constitution of 1876. The authorities on this point are decisive. The following clearly states the rule and the state of authority:<sup>80</sup>

It is held in *Finders v. Bocle*, 58 Neb. 57, 78 N. W. 480, that an act of the legislature, passed in violation of the constitution, is void from the date of its enactment, and that—"An unconstitutional statute creates no new right and abrogates no old ones. It is for all purposes as though it had never been passed."

It is held by the United States Supreme Court in *Norton v. Shelby County*, 118 U. S. 425, 442, 6 Sup. Ct. 1121, 1125 (30 L. Ed. 178), that—"An unconstitutional act is not a law; it confers no rights; it imposes no duties; it affords no protection; it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed."

Cooley in his work on Constitutional Limitations (7th Ed.) at page 259, lays down the rule thus:

"When a statute is adjudged to be unconstitutional, it is as if it had never been. Rights cannot be built up under it; contracts which depend upon it for their consideration are void; it constitutes a protection to no one who has acted under it, and no one can be punished for having refused obedience to it before the decision was made. And what is true of an act void in toto is true also as to any part of an act which is found to be unconstitutional, and which, consequently, is to be regarded as having never, at any time, been possessed of any legal force."

If the law-making power goes through the form of enacting a law, which it is prohibited by the constitution from enacting, its action is wholly void and cannot be validated by a subsequent

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<sup>80</sup>*Whetstone v. Slonaker*, 110 Neb. 343, 193 N. W. 749.



amendment to the constitution so as to confer authority upon the legislature to pass such a law. *Seneca Mining Co. v. Osmun*, 82 Mich. 573, 47 N. W. 25, 9 L. R. A. 770; *Dewar v. People*, 40 Mich. 401, 29 Am. Rep. 545; *Village of Mt. Pleasant v. Vanice*, 43 Mich. 361, 5 N. W. 378, 38 Am. Rep. 193; *Ex Parte Sparks*, 120 Cal. 395, 52 Pac. 715; *Norton v. Shelby County*, *supra*.

"An act of the legislature, not authorized by the State Constitution at the time of its passage, is absolutely null and void, and is not validated by a subsequent adoption of an amendment to the constitution authorizing it." *State v. Tufly*, 20 Nev. 427, 22 Pac. 1054, 19 Am. St. Rep. 374.<sup>81</sup>

A void statute is only rendered valid by the adoption of a constitutional amendment which expressly ratifies and confirms it.<sup>82</sup> This provision as to the right of trial by jury was contained in the Constitution of 1845<sup>83</sup> and its inclusion in the Constitution of 1876 did not extend the right but only secured it in cases in which it was a matter of right before.<sup>84</sup>

The case of *White v. White*<sup>85</sup> involved a statute in force at the time of the adoption of the present constitution giving the right of trial by jury in lunacy cases which was held by the court to have had its origin in the early history of the common law. Such is not the case here. Jury trial was never a part of disbarment procedure<sup>86</sup> and necessarily is foreign thereto.<sup>87</sup>

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<sup>81</sup>The following additional authorities also support the rule as stated: *Dullman v. Willson*, 53 Mich. 392, 19 N. W. 112, 51 Am. Rep. 128, 131; *Ex parte Bockhorn*, 62 Tex. Crim. Rep. 651, 138 S. W. 706; *Pittman v. Byars*, 51 Tex. Civ. App. 83, 112 S. W. 102; *Ringling v. City of Hempstead*, 113 C. C. A. 464, 193 Fed. 596 (5th Cir.); *Neisal v. Moran*, 80 Fla. 98, 85 So. 346, 359; *State v. Miller*, 66 W. V. 436, 66 S. E. 522; *Atkinson v. Southern Express Co.*, 94 S. C. 444, 78 S. E. 516; *Dennison Mfg. Co. v. Wright*, 156 Ga. 789, 795, 120 S. E. 120, 123; 12 C. J. 727.

<sup>82</sup>*Fontenot v. Young*, 128 La. 20, 54 So. 408.

<sup>83</sup>HARRIS: CONSTITUTION OF TEXAS, Annotated, p. 132.

<sup>84</sup>35 C. J. 148-149, N. 9a, and cases cited; *Arnold v. Leonard*, 114 Tex. —, 273 S. W. 799.

<sup>85</sup>*Supra*, Note 80.

<sup>86</sup>35 C. J. 186, 6 C. J. 602-603.

<sup>87</sup>In *re Shapard*, 109 Mich. 631, 636, 67 N. W. 971, 972: "We think it unnecessary to discuss the defendant's claim to a right of trial by jury. The control of admission to the bar is confined to courts, and juries have nothing to do with it. It has been the uniform practice for the judge to dispose of such matters."

In *re Smith*, 179 Pa. St. 14, 21, 36 Atl. 134, 135: "From the very nature of his office, and its relation to the public and the court, a lawyer who enters, at his own solicitation, by the front door, subjects himself to ejection by the back one if he do not 'behave himself well.' Nor is there any more reason for calling in a jury to pass upon his misconduct, when he is put without the bar, than for calling in one to pass upon his professional qualifications when he is admitted within it.

Only a few jurisdictions have provided such procedure, and so far as I have been able to find the legality of such a statute, has never been considered by the courts.<sup>88</sup>

It is believed that the courts of Texas owe no deference to the statute providing for a jury trial in disbarment proceedings; that to defer to such statute is an unwarranted surrender of the court's power—a power which out of regard for the usefulness of the profession and for the due administration of justice should not be sacrificed on any pretext. If cognizance is taken of such a statute, it should be only as a special procedure provided in aid of the court's powers and in nowise a restriction thereof. Under any view, however, the legislature has just as much power at this time as it ever possessed to furnish the courts with such aid as may seem advisable, and may repeal the provision of the statute allowing the defendant the right of trial by jury in such cases. The fact that the statute has been on the books for a long time and has been acted under in several instances need not embarrass the courts. The powers of a great department of government are not lost in any such manner. The legality of a statute cannot come before the court until a proper case arises, and the point is properly raised,<sup>89</sup> nor could a recognition of the statute in the instances which have come before the courts be considered more than an indication that the special procedure provided by the legislature was adaptable and reasonable for the particular cases.

My general conclusion on the subject of disbarment is that every court of record in the state has the inherent power in a proper case to discipline a member of the bar for unprofessional conduct. This power ranges from the merest rebuke to striking from the roll of attorneys practicing before the particular<sup>90</sup> court, if not to a revocation of his license altogether. Further, that such recognition may be given to the acts of the legislature as their merits and practical value may justify. The only limitation upon the power of the courts

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The subject of investigation and judgment in both cases is one for which the court, and the court alone, is well qualified, while the jury is not. . . . "In *Davies' Case*, 93 Pa. St. 120, this court said: 'The power of the court to admit as an attorney at its bar a person possessing the requisite qualifications, and to remove him therefrom when found unworthy, has been recognized for ages, and cannot be questioned.'"

<sup>88</sup>See *Reilly v. Cavanaugh*, 32 Ind. 214; *Wernimont v. State*, 101 Ark. 210, 142 S. W. 194, Ann. Cas. 1913D, 1156. These cases merely recognize such statutes.

<sup>89</sup>*Muskraat v. U. S.*, 219 U. S. 346, 55 L. Ed. 246, 31 Sup. Ct. 250.

<sup>90</sup>See *Scott v. State*, 86 Tex. 321, 323, 24 S. W. 789, 790.

of this state in such matters is the one of due process of law, which demands even in a summary proceeding that an opportunity be given the defendant to be heard. If heard by an inferior court, the defendant would have the right to have the action of the court reviewed as in other cases.<sup>91</sup> As a practical matter, however, it is felt that the legislature should recognize the problem as belonging to the courts and hand it over to them as has been done generally. And further, that the Supreme Court, when the proper occasion shall arise, should indicate clearly the power of the courts as well as the manner in which it should be exercised.

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Turning now to the problem of admission, any question that may have arisen involving the respective powers of legislature and the courts to control admission to the bar in this state, is, practically speaking, a moot one. The legislature has given over to the Supreme Court full supervision and control over the subject, which was no doubt already a prerogative of that court. The Supreme Court is the proper unit of the judiciary to exercise such power. Unlike the question of discipline, the admission prerogative should be under the exercise of a single court. The legislature has created a Board of Law Examiners, the members of which are appointed by and subject to removal by the Supreme Court.<sup>92</sup> This board passes upon the eligibility of applicants for examination, acting under instructions of the court.<sup>93</sup> This practice is in keeping with the best thought on the subject as well as historically sound. The court is empowered to make rules governing eligibility for taking the examinations and the manner of conducting the same, covering, among other points, proper guarantees to insure good moral character, adequate pre-legal study, adequate study of the law for *at least* two years, designation of the subjects to be covered by such study and examination, time, place, and manner of examinations and the grades to be made by applicants. Likewise, the court is given full control over admission of attorneys from other states.<sup>94</sup> These are all powers that the court already possessed, are reasonable, and furnish no excuse for testing the power of the legislature to prescribe them. The Supreme Court of Texas is

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<sup>91</sup>Scott v. State, 86 Tex. 321, 24 S. W. 789.

<sup>92</sup>Art. 304, R. S. 1925.

<sup>93</sup>Art. 305 *id.*

<sup>94</sup>Art. 308 *id.*

clearly the responsible agency of government for determining the standards which shall govern the quality and the progress of the bar of Texas.

There is only one instance in which the directions of the legislature are subject to criticism and which if considered mandatory, constitute an encroachment upon the judicial prerogative. Article 307 reads as follows:

The Supreme Court by general order shall exempt graduates of such law schools as may be approved by such court from taking any examination as to pre-legal or legal studies and attainments, but such graduates must in all instances furnish evidence as to moral character required of candidates. Every law school in this state shall be approved for this purpose which maintains the following standards:

1. Admission requirements of law equivalent to successful completion of the four years' high school course.

2. A law curriculum extending over at least three scholastic years with not less than ten hours classroom work in law a week for each of the three classes, respectively.

3. Standards for credit based upon written examination satisfactory to the Supreme Court.

4. A library of not fewer than 2500 well selected law books.

Under this article the court has placed upon an approved list certain schools outside the state as well as schools in the state, whose graduates are exempt from examination. No doubt the court has the power to refuse to approve any school outside the state. Aside from the court's inherent power, the legislation is clearly directory. Likewise, under Section 3 of this article the court has room for exercising a broad discretion as to "standards of credit satisfactory to it" as to schools within the state, even though the statute should be deemed mandatory. Of course, if the court consider the statute mandatory, it must either approve all schools that make a *prima facie* showing or else must be prepared to go fully into the standards of schools in general and the particular school in question—a matter that the court is hardly in position to do. It is believed that the statute is purely advisory and should be considered as such. Moreover, under the authorities and history of admission generally the court is not bound by the provisions of this statute in any particular unless it desires to be bound.<sup>95</sup> If this is a correct conclusion, the court, if it

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<sup>95</sup>In *re Day*, 181 Ill. 73, 54 N. W. 646, 50 L. R. A. 519; In *re Branch*, 70 N. J. L. 537, 576, 57 Atl. 431; see also note 35, *supra*.



would not adopt such methods of admission of its own accord, should abandon its practice of exempting the graduates of any law school from examinations. It takes no argument to show that the graduates of no school should be accepted *in toto*. The best of schools graduate men who are not fitted to practice law. Practically all schools permit a wide choice of subjects for students. Law students frequently choose subjects to fit them for special work with no expectation of practicing law. Later they change their minds. Weak students from any schools will go almost any length to escape the rigid bar examinations which are maintained by most states. Our statute is a standing invitation to the weaklings of every approved outside school to come to Texas. Certain agencies make it a business to herald such information widely. Moreover, the best of law students need some incentive to make them keep their whole study knit together over their period of school attendance. In a school, a subject passed is a subject completed. A rigid examination at the end of their law school career would tend to make better students throughout their attendance upon the school with good results to student, school, and bar. This approval of outside schools upon reputation, without any examination into the qualifications of the particular applicant is a grave source of danger to the profession in Texas which the court can and should avoid.

The provision as to state schools rests upon no sounder basis or wiser policy. If anything, it is more vicious. The minimum requirements prescribed for a school under the statute are as a rule far below those prescribed by a great majority of outside schools which have been approved. In the last analysis, it is a sort of a fraud on students themselves for the court to approve schools that only *prima facie* meet such standards. It is true that the graduates of the law school of the University have been exempt for many years. No doubt many lawyers have been admitted to the profession through this exemption who have no place in it. This exemption has certainly not tended to raise the standards of the profession, and the late Dean Townes stood against the exemption. No other law school in the state is conducted under state supervision and whatever excuse there might have been at one time for exempting graduates of a state institution cannot apply to institutions over which the state has no supervision or control whatsoever. In fact, the exemption was made by the legislature at a time when practically no standards were required for admission, and thus it

was a waste of time to require graduates of the law school to go through with the procedure then required for admission. But at this time when the examinations are much stricter, the reason for the exemption no longer obtains and should be abolished. The whole idea is a vicious one and should be uprooted before the roots of vested interests have become too firmly fixed, and political influences have made it impossible to correct the evil results.<sup>96</sup>

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On the point of educational and moral qualifications demanded of applicants generally, the court cannot well be too strict. The standing of the profession and the influence it shall exert are not the only factors; the matter affects the administration of justice from the justice courts to the Supreme Court, in the courthouse and in the office; the conduct of every department of the state's government and the life of every community in the state. No matter of public, and few of private, concern escapes the lawyer's influence. There is much more reason for thoroughly trained and honorable lawyers than for any other profession. There is no lawyer who does not daily feel conscious of the need of a better prepared bar. Moreover, laymen are justifiably caustic in their attitude toward a profession that proposes to attend to everybody's business except its own. The responsibility of a busy court in this particular is a grave one. The American Bar Association considered the matter patiently and thoroughly over a period of many years, and its recommendations are worthy of the greatest respect. Likewise the Conference of Bar Association Delegates,<sup>97</sup> after debating the matter from every angle, came to the same conclusion as the American Bar Association. The following resolution was passed by this conference:

Resolved, That the National Conference of Bar Associations adopt the following statement in regard to legal education:

1. The great complexity of modern legal regulations requires for the proper performance of legal services lawyers of broad general education and thorough legal training. The legal education which was fairly adequate under simpler economic conditions is inadequate today. It is the duty of the legal profession to strive to create and maintain standards of legal education and rules of admission to the bar which will protect the public both from in-

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<sup>96</sup>See recommendations of AMERICAN BAR ASSOCIATION quoted below.

<sup>97</sup>A special Conference on Legal Education held at Washington, Feb. 23, 1922.

competent legal advisers and from those who would disregard the obligations of professional service. This duty can best be performed by the organized efforts of bar associations.

2. We endorse with the following explanations the standards with respect to admission to the Bar, adopted by the American Bar Association on September 1, 1921:

"Every candidate for admission to the Bar should give evidence of graduation from a law school complying with the following standards:

(a) It shall require as a condition of admission at least two years of study in a college.

(b) It shall require its students to pursue a course of three years duration if they devote substantially all of their working time to their studies, and a longer course, equivalent in the number of working hours, if they devote only part of their working time to their studies.

(c) It shall provide an adequate library available for the use of the students.

(d) It shall have among its teachers a sufficient number giving their entire time to the school to insure actual personal acquaintance with the whole student body."

3. Further, we believe that law schools should not be operated as commercial enterprises, and that the compensation of any officer or member of its teaching staff should not depend on the number of students or on the fees received.

4. *We agree with the American Bar Association that graduates from a law school should not confer the right of admission to the Bar, and that every candidate should be subjected to examination by public authority other than the authority of the law school of which he is a graduate.*

5. Since the legal profession has to do with the administration of the law, and since public officials are chosen from its ranks more frequently than from the ranks of any other profession or business, it is essential that the legal profession should not become the monopoly of any economic class.

6. We endorse the American Bar Association's standards for admission to the Bar because we are convinced that no such monopoly will result from adopting them. In almost every part of the country a young man of small means can, by energy and perseverance, obtain the college and law-school education which the standards require. And we understand that in applying the rule requiring two years of study in a college, educational experience other than that acquired in an American college may, in proper cases, be accepted as satisfying the requirement of the rule, if equivalent to two years of college work.

7. We believe that the adoption of these standards will increase the efficiency and strengthen the character of those coming to the practice of law, and will, therefore, tend to improve greatly the administration of justice. We therefore urge the bar associations of the several states to draft rules of admission to the Bar carrying the standards into effect and to take such action as they may deem advisable to procure their adoption. . . .

8. We believe that adequate intellectual requirements for admission to the Bar will not only increase the efficiency of those admitted to practice but will also strengthen their moral character. But we are convinced that high ideals of professional duty must come chiefly from an understanding of the traditions and standards and by the personal contact of law students with members of the Bar who are marked by real interest in younger men, a love of their profession and a keen appreciation of the importance of its best traditions. We realize the difficulty of creating this kind of personal contact, especially in large cities; nevertheless, we believe that much can be accomplished by the intelligent cooperation between committees of the Bar and law-school faculties.

9. We therefore urge courts and bar associations to charge themselves with the duty of devising means for bringing law students in contact with members of the Bar from whom they will learn by example and precept, that admission to the Bar is not a mere license to carry on a trade, but that it is an entrance into a profession with honorable traditions of service which they are bound to maintain.<sup>98</sup>

Some states have already adopted these recommendations as a working basis for promoting the interests of their bars, and the American Bar Association has classified the law schools of the country which meet the requirements recommended.<sup>99</sup>

There is no answer to this position. There was for a long time a sentiment that a trained bar was undemocratic. Ignorance and incompetency never were prerequisites for democracy. This attitude was merely a misplaced sympathy for the "poor" boy. As a matter of fact, the poor boy has always taken care of himself. Low standards do not aid the poor boy; they merely allow the trifler and trickster to cheapen what the poor but honest and ambitious young man gives his time and study to attain. College and law-school training are within

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<sup>98</sup>See Vol. XLVII, REPORTS OF AMERICAN BAR ASSOCIATION (1922), pp. 482-591, for full report of the Proceedings of the Conference.

<sup>99</sup>See Report of the Section on Legal Education, Vol. L, REPORTS OF AMERICAN BAR ASSOCIATION (1925); AMERICAN BAR ASSOCIATION JOURNAL (Nov., 1923), and subsequent numbers of the JOURNAL.



the reach of every man who has the making of a lawyer within him. And if those who have the responsibility of the profession within their keeping desire to protect the poor youth who trains himself to become a fit public servant and honorable member of the profession they can best do so by maintaining such standards as will not allow him to be subjected to the harassing influences which tear down what worth-while poor boys of the country have built up. But after all it is not the fate of particular individuals which should be the controlling factor in this matter; it is their fitness to administer the trusts that are imposed upon those who practice law as their profession.

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The remaining question is purely a practical one. If our conclusion is correct that the responsibility for administering these important functions of the profession rests squarely upon the courts of our state, then the question arises as to how the courts shall be set in motion. As to the questions of discipline, it would seem that any lawyer, any group of lawyers, any bar organization, or any committee of any lawyers' organization, or any other person or persons might institute proceedings for disciplining a member, preferably, of course, before the district court since its machinery is best adapted for trial procedure, but not necessarily so, as our Supreme Court and the Courts of Civil Appeals are equally available, and the latter, convenient to most centers of population and by virtue of the number of judges, could perhaps give such cases more thorough consideration. The procedure would be similar to that of any other proceedings before a court. Notice and fair opportunity to be heard would be the essentials to guard carefully, and the right of review of the proceedings should be had if heard before an inferior court. Thus, the method for cleaning our professional house seems entirely adequate.

The problem of admission now rests upon a court already overburdened with administrative duties considering the number of its members, and those members are tragically overworked and underpaid for their services. But it would seem that should the court exercise its prerogative and prescribe standards which would allow no uncertainty of eligibility for examinations, it could well leave the matter of examination itself to the members of the profession selected for this purpose. So far, those who have been selected for this duty have met the hopes of those who initiated the new procedure for ad-

mission. They should be given a free hand much as the benchers of the Inns of Court.<sup>100</sup>

*Leon Green.*

University of Texas.

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<sup>100</sup>In every jurisdiction having a large bar, professional organization and discipline soon become too difficult problems to be handled entirely either by the legislature, the courts or by a voluntary association. As a matter of experience it seems that the most effective organization is a sort of self-government by the bar under the sanction of the legislature and subject to court supervision in all important matters. Some of the American bars, however, have simply taken charge, and with the support of the courts have been successful in the handling of the profession's affairs. Recently some of the states, particularly Alabama, North Dakota, Idaho, and New Mexico, have inaugurated more formal organizations under legislative authority. Under this plan (known as the "Alabama Plan") every lawyer automatically becomes a member of the bar association whose affairs are administered largely by a board of commissioners subject in some particulars to approval by the Supreme Court. See General Acts of Alabama (1923), pp. 100-107. See Vol. 48, REPORTS OF NEW YORK STATE BAR ASSOCIATION (1925), pp. 79-102, 223-232. At the last meeting of the Texas Bar Association a committee was authorized to study the matter from the membership point of view (PROCEEDINGS, 1925, p. 129), and this will probably provoke a discussion of the whole organization problem.

## ARTICLE 27 OF THE MEXICAN CONSTITUTION: THE PETROLEUM QUESTION

When the present session of the Mexican Congress convened last September, the attention of the public was again directed to the famous Article 27 of the Constitution of 1917, for, although eight years have elapsed since the promulgation of the constitution, Congress has yet before it the problem of enacting organic laws for interpretation and enforcement of the various provisions of this article.

Probably no single article of a constitution ever came in for as much discussion as that caused by this Article 27; in fact, no article of a constitution ever embraced such a variety of subjects of international interest. It has been characterized as the crowning glory of the revolution, for, with the exception of the labor reforms which were incorporated in Article 123, practically all of the causes championed by the revolutionists were crystallized into the supreme law of the land by this article. In it are provisions for the restitution of *ejidos* and the division of *latifundios* or large landed estates, for the promotion of colonization and the creation of the homestead, for the nationalization of church property, for the extension of federal zones, for the nationalization of the petroleum deposits of the subsoil, and other provisions too numerous to mention. The special commission appointed by Congress to prepare and submit reglementary laws for the enforcement of the article brought in a report recommending the enactment of fifteen organic laws to cover the fifteen separate subjects included in this one article.

Because of the extensive investments of foreign capital in the petroleum industry in Mexico, the first controversy of international interest arose over the retroactive application of Section 4, which declared all petroleum deposits to be under the direct ownership of the national government. During the years just following the promulgation of the new constitution, legal libraries were filled with learned discussions concerning the theory of this provision, both attacking and defending the right of the government to declare the subsoil of petroleum lands the property of the nation. Students and jurists delved into Roman law, analyzed the doctrine of eminent domain, and traced the development of the *patrimonio real* of the Spanish Crown to sustain extended theses on both sides of the question. It would be interesting to review these arguments, but inasmuch as the provision has already been con-

strued by the Supreme Court, it would serve very little purpose to do so. What I shall attempt to do is, as far as is possible with the decisions and other material at hand, to give an idea of the interpretation and application of the provision. To do this, I shall go back only as far as necessary in order to establish a background of the issue involved.

Before the promulgation of the Constitution of May 1, 1917, the owners of the surface were allowed to exploit the petroleum deposits of the subsoil without restriction. The mining laws of 1884, 1892, and 1909 all contained provisions to the effect that the petroleum deposits of the subsoil were the exclusive property of the owners of the surface, who as such could exploit same without the necessity of special adjudication.<sup>1</sup>

The last mentioned mineral law was in force at the time of the promulgation of the new constitution, which contained in paragraph 4 of Article 27, the following:

There belong to the nation the direct ownership (*dominio directo*) of all the minerals or substances that in veins, strata, or beds constitute deposits whose nature should be distinct from the components of the soil, such as the minerals from which are extracted metals and metalloids used in industry; the beds of precious stones, of rock salt and salt mines formed directly by marine waters; the products derived from the decomposition of rocks, when their exploitation requires subterranean works; the phosphates susceptible of being used as fertilizers; the combustible solid minerals, *petroleum*, and all solid, liquid or gaseous carbides of hydrogen.

Pending the enactment of the organic petroleum law, the President, in the use of extraordinary powers<sup>2</sup> granted him by Congress, began to issue decrees for the regulation and enforcement of the article. The

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<sup>1</sup>Article 10 of the Mining Law of 1884 provided:

"The following are the exclusive property of the owner of the soil, who as such, without the necessity of denouncement or of special adjudication can exploit and profit by same:

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"5. Salts which exist in the surface, waters pure and salt, superficial and subterranean, *petroleum*, and the gaseous thermal and medicinal waters."

The Mining Law of 1892 contained a like provision, and Article 2 of the Mining Law of 1909 provided:

"The following are the exclusive property of the owner of the soil:

"1. The beds or deposits of mineral fuels in all their forms and varieties."

<sup>2</sup>Granted on May 8, 1917, under Article 29 of the Constitution which provides that Congress may invest the President with extraordinary powers "in cases of invasion, of grave disturbance of the public peace, or of anything else that places society in grave danger."



principal decrees so issued were those of July 31 and August 8 and 12, 1918,<sup>3</sup> providing for the manifestation of petroleum lands, burdening all pre-constitutional contracts with special taxes, forfeiting the rights of lessees of petroleum lands who did not comply with such regulations, and providing for the denouncement of such lands. The enforcement of these decrees was the occasion of numerous *amparos*<sup>4</sup> on the part of the petroleum companies to restrain the application of the decrees to petroleum lands acquired before the date of the new constitution.

On August 30, 1921, the Supreme Court handed down its decision in the amparo proceedings instituted by The Texas Company,<sup>5</sup> granting the company the relief prayed for. Decisions followed in four more cases,<sup>6</sup> thus constituting the five decisions necessary to establish *jurisprudencia*.<sup>7</sup> All of the cases involved practically the same statement of facts, and since The Texas Company case is regarded as the leading case, it will be necessary to examine only that decision. Complainant company claimed to be the assignee of a petroleum lease in a tract of land in Zacamixtle, State of Vera Cruz, which it had acquired from one Manuel Ravisé, who had acquired same from the owners of the surface by a public document dated prior to May 1, 1917, the date the new constitution went into effect. Said land was not manifested as required by the presidential decrees, and one Rafael Cortina denounced same before the Secretariat of Industry, Commerce and Labor; on December 10, 1920, the company was informed that the said Cortina had been issued a denouncement title granting him the

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<sup>3</sup>*Legislacion Petrolera*, Vol. I, pages 130, 133 and 141.

<sup>4</sup>*Amparo* is an extraordinary remedy allowed against laws and acts of authorities which violate personal guarantees, restrict the sovereignty of the states or invade the sphere of federal authority. In proceedings of this kind it is similar to our injunction, although in other cases it may partake of the nature of a writ of *habeas corpus*. *Ley de Amparo*, Art. 1.

<sup>5</sup>*Texas Company of Mexico, S. A. v. Secretaría de Industria et al.*, *Seminario Judicial*, Quita Epocha, Vol IX, page 432.

<sup>6</sup>*International Petroleum Co. v. Agente del Petroleo*, *Seminario Judicial*, Vol. X, page 1189.

*Tamiahua Petroleum Co. v. Secretaría de Industria et al.*, *Seminario Judicial*, Vol. X, page 1189.

*Idem.* *Seminario Judicial*, Vol. X, page 1190.

*International Petroleum Co. v. Secretaría de Industria et al.*, *Seminario Judicial*, Vol. X, page 886.

<sup>7</sup>In Mexico, five decisions of the Supreme Court are necessary to constitute *stare decisis*. Art. 148 of the Judicial Code provides:

"The decisions of the Supreme Court of Justice in which seven or more of its members concur shall constitute a part of the law (*jurisprudencia*) of the land, provided always that the principle be established by five consecutive decisions to the same effect."

right to explore and exploit the said land for petroleum.

The Texas Company asked for a writ of *amparo* against the President and the Minister of Industry, Commerce and Labor to restrain them from issuing the denouncement title to Cortina. The case came before the Supreme Court on review, and the principal point urged by the complainant was that the enforcement of the decrees as to the land in question constituted a retroactive application of Article 27 in violation of Article 14 of the Constitution.<sup>8</sup> In discussing this question, the court distinguished between retroactive laws passed by Congress and retroactive provisions of the constitution, and stated that in the former case, retroactive effect could not be given to such laws because of Article 14 of the Constitution. The court went on to say, however, that the framers of the constitution, "for social or political reasons of paramount importance," could have provided exceptions to Article 14 and established retroactive precepts which the courts would have to apply retroactively, notwithstanding the provisions of Article 14, for the reason that provisions co-existing in the same constitution have equal force; that in such cases it would be necessary to harmonize the different provisions and determine which constitute exceptions to the general rule.

The court then passed to the question of whether or not it was intended that paragraph 4 of Article 27 should be applied retroactively. The point was resolved in the following words:

Paragraph 4 of Article 27 of the present constitution cannot be deemed retroactive, either in the letter or the spirit thereof, since it does not violate acquired rights. Not in the letter thereof, for it does not contain an express mandate in the sense of its retroactivity, nor is retroactivity to be implied by the wording thereof. Not in its spirit, for it proves to be in consonance with the other articles of the same constitution which recognize in general the old principles whereon are postulated the rights of man and give ample guarantees to said rights.

In defining what is necessary to constitute retroactivity, the court said:

On the other hand, it is well known that for a law to have retroactive effects two co-existent circumstances are required—that the law operate as to past time and that it injure rights acquired under the empery of other prior laws wherewith the new law is

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<sup>8</sup>Article 14 of the Constitution of 1917 provides in part: "To no law shall retroactive effect be given to the injury of any person."

at variance. The last mentioned factor is above all essential. If the laws relate to the past, yet despite this prove harmless as to rights, in that same do not infringe rights previously acquired, then retroactivity does not indeed exist.

Applying this principle to the present case, the court held that since The Texas Company had acquired the right to explore and exploit the land for petroleum purposes by virtue of a contract dated before the effective date of the new constitution, the act of granting an exploration and exploitation title to another constituted a retroactive application of the said decree in violation of Article 14 of the Constitution. In referring to the contract of April 28, 1917, the court said:

It appears that the conveyors fixed and received a higher price than that which corresponded to the surface owners of the land, because it was not the intention to cultivate same or to erect structures on same, but to search for petroleum and to exploit it if need be. So that the faculties vested in the owners of lands as granted by Article 2 of the said law of November 25, 1909, were translated into *positive acts*, regarding consequently the rights acquired by Ravisé as to petroleum exploration and exploitation of the said lot in Zacamixtle, from the date of the said contract, that is, previously to the time the present constitution in its entirety began to govern.

All of the cases thus far decided by the Supreme Court involved land in regard to which there were contracts leasing the subsoil for petroleum purposes prior to the effective date of the new constitution, and the court has yet to pass directly upon the status of the subsoil of lands which were not leased prior to May 1, 1917. However, the statement quoted in the preceding paragraph is looked upon as the criterion for the application of Article 27, and by administrative interpretations and dispositions there has developed what might be termed the "positive act" doctrine, which is, that the determining factor in regard to retroactivity is whether or not there was a positive act, signifying an intention to dedicate the land to petroleum purposes before the new constitution went into effect. The court does not indulge in argument, and, to understand the reasoning by which this doctrine was arrived at, one must resort to the debates in the Mexican Academy of Legislation and Jurisprudence, and to contemporary writings.<sup>9</sup> It

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<sup>9</sup>*Documentos Relacionados con la Legislacion Petrolera Mexicana*, published by the Secretariat of Industry, Commerce and Labor.

Revista General de Legislacion, Vol. I.

was urged that it was necessary to distinguish between vested rights and those which were mere expectancies;<sup>10</sup> that petroleum in its natural state under the ground is not subject to ownership, and that vested rights in same cannot exist until something is done to reduce it to possession;<sup>11</sup> that the mining laws of 1884, 1892, and 1909 did not in themselves vest rights in the surface owners to the petroleum in the subsoil;<sup>12</sup> that these laws, promulgated for the purpose of regulating the mining industry, merely excepted the exploitation of petroleum deposits from their provisions, and granted the owners of the surface the preferential right to explore and exploit such deposits, but that until this right was exercised the right was merely an expectancy and the title to the deposits remained in the nation.

Just what circumstances, then, must be shown in order to establish that a "positive act" was performed by the surface owner prior to the date the new constitution went into effect? The court mentions as important considerations that more money was paid for the land involved in The Texas Company case than would ordinarily correspond to the value of the surface, and that the intention was to exploit for oil. The investment of money in geological reports, the incurring of expenses in

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<sup>10</sup>Boudry-Lecontinere has been quoted in this connection:

"The entire difficulty in this matter—and which is quite serious—lies, in short, in the distinction between those commonly called 'acquired rights' and mere rights, interests and expectations.

"According to Merlin, by acquired rights should be understood legal powers duly exercised, and by expectations or interests those legal powers which had not been duly exercised at the time the change in legislation became effective."—*Treatise on Civil Law*, Vol. I.

<sup>11</sup>"We leave unharmed, it is clear, the titles of utilization that the industry has gained by its efforts, and the interests that have been created by it in pursuance of the preceding legal regimen; but denying, as we have denied, titles of ownership or of dominion to the surface owners as regards the subsoil—unknown or not even explored—we cannot suppose the possibility of retroactive injury obtains in respect to them, for the reason that we do not admit either the ownership or the dominion which, it is said, they hold as to the subsoil in reference."—*La Controversia del Petroleo*, by Salvador Mendoza, page 549.

<sup>12</sup>In the chambers of the Mexican Academy of Legislation one might hear with great appositeness the voice of men learned in jurisprudence maintaining the nonexistence of acquired rights. It was said that, due to the condition of things the existence of which was unknown, as was the case with subterranean hydrocarbons until same should be discovered, it was in order to observe literally the principle of Savigny, in accord with which there can be no ownership of that which is not possessable and recoverable.

In this view, the precept of the law of 1884, and of the new law of 1909, signifies only a preferential title constituted in favor of the owner of the soil in obtaining the free exploitation of the combustible content of the subsoil. The titular of the direct dominion would always have been the Nation, and it only happened that freedom from all charges, impositions or tributes was granted as to that which was done by the superficiary. Moreover, proscription ran in respect of any one who was not owner of the surface as to any form of exploitation.—*La Controversia del Petroleo*, pages 552-3.



attempts to interest operators, or merely the purchase of land in proven or semi-proven territory at an advanced price would seem to be sufficient to show an intention to dedicate the subsoil to petroleum exploitation, but any definite conclusion would be speculative pending further decisions. Perhaps the most extensive and authoritative statement is that made by the representatives of the Mexican government at the Mexican-American conference preceding the recognition of Mexico by the American government, held in Mexico City from May 14 to August 15, 1923. The following is the statement of the Mexican representatives<sup>13</sup> as set forth in the minutes of said conference:

It is the duty of the federal executive power, under the constitution, to respect and enforce the decisions of the judicial power. In accordance with such a duty, the executive has respected and enforced, and will continue to do so, the principles of the decisions of the Supreme Court of Justice in the 'Texas Oil Co.' case and the four similar 'amparo' cases, declaring that paragraph IV of Article 27 of the Constitution of 1917 is not retroactive in respect to all persons who have performed, prior to the promulgation of said constitution, some positive act which would manifest the intention of the owner of the surface or of the persons entitled to exercise his rights to the oil under the surface to make use of or obtain the oil under the surface, such as drilling, leasing, entering into any contract relative to the subsoil, making investments of capital in lands for the purpose of obtaining the oil in the subsoil, carrying out works of exploitation and exploration of the subsoil, and in cases where from the contract relative to the subsoil it appears that the grantors fixed and received a price higher than would have been paid for the surface of the land because it was purchased for the purpose of looking for oil and exploiting same if found; and, in general, performing or doing any other positive act, or manifesting an intention of a character similar to those heretofore described. According to these decisions of the Supreme Court, the same rights enjoyed by those owners of the surface who have performed a positive act or manifested an intention such as has been mentioned above will be enjoyed also by their legal assignees or those persons entitled to the rights to the oil. The protection of the Supreme Court extends to all the land or subsoil concerning which any of the above intentions have been manifested or upon which any of the above specified acts have been performed, except in cases where

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<sup>13</sup>Proceedings of United States-Mexican Commission, page 47, Department of State, Washington, D. C.

the documents relating to the ownership of the surface or the use of the surface or the oil in the subsoil establish some limitation.<sup>14</sup>

This, then, is the status of the question pending the passage of a petroleum law by the National Congress. Those lands in regard to which "positive acts" as above explained were performed prior to May 1, 1917, may continue to be exploited by the surface owners and lessees, subject only to technical and fiscal regulations which the government may establish. As to all other lands, of course, it is considered that the title to the subsoil is vested in the nation by Article 27, and the exploration and exploitation of the petroleum deposits in such lands will be defined and regulated by the Organic Petroleum Law to be enacted by Congress.

*Sam G. Baggett.*

San Antonio.

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<sup>14</sup>To this statement the American Commissioners made the following reservation:

"The American Commissioners have stated in behalf of their government that the Government of the United States now reserves, and reserves should diplomatic relations between the two countries be resumed, all the rights of the citizens of the United States in respect to the subsoil under the surface of lands in Mexico owned by citizens of the United States, or in which they have an interest in whatever form owned or held, under the laws and Constitution of Mexico in force prior to the promulgation of the new Constitution, May 1, 1917, and under the principles of international law and equity. The Mexican Commissioners, while sustaining the principles hereinbefore set forth in this statement but reserving the rights of the Mexican Government under its laws as to lands in connection with which no positive act of the character specified in this statement has been performed or in relation to which no intention of the character specified in this statement has been manifested, and its rights with reference thereto under the principles of international law, state in behalf of their Government that they recognize the right of the United States Government to make any reservation of or in behalf of the rights of its citizens."—*Proceedings of the United States-Mexican Commission*, page 49.

## MAGNA CHARTA

In the office of the Treasurer, the Chief Executive Officer of the Middle Temple in London, hangs a facsimile copy of the Declaration of Independence, having a golden star opposite the name of each of the five signers who were members of that Temple.

This is not so unusual as it may seem, because in truth and in fact the Declaration of Independence was but one, in that series of documents, that established the Constitution of England, and made secure the liberties of its people. The Briton is an inheritor of the rights proclaimed in the Declaration of Independence, and every American citizen is even more an heir to the guaranties provided in the great documents of English liberty.

Not the first of these, but perhaps the greatest, is Magna Charta, wrested from King John at Runnymede on June 15, 1215, concerning which Stubbs says: "The whole of the Constitution of England is a commentary on this Charter." It secured no new rights to the Barons or to the Freemen. It simply proclaimed or declared rights that had been existing for centuries before, and the recognition of which had been the cause of countless conflicts between the people and the King. The greatest incident in connection with this document is perhaps not its contents, but in the mere fact that in it the King was made to recognize limits to his prerogative, and that his rule was subject to the superior rights of the people.

It may be stated as a general proposition that in practically all governmental conflicts the same problems, in slightly differing forms, have always been the potent causes, and in this brief paper it is hoped that the reader may be incited to mental exercise that will demonstrate to him that the same problems that produced Magna Charta exist today.

## THE FEUDAL SYSTEM

While the English nation is largely Teutonic in its derivation, it must be remembered that its governing class in 1215 was French. In France we find the origin of the Feudal System and its development to the highest degree. Charlemagne had conquered practically all of Europe; the power of his mind, and the strength of his arms were sufficient to establish at least a nominal system of government that was adequate to keep the conquered provinces within his control. And the kingdom which he governed was called the "Holy Roman Empire," which Green says was neither Holy nor Roman. Upon his death

his sons had neither the mental nor the physical power to govern and control their inheritance. They thereupon devised a plan whereby the Kingdom was parceled out into provinces, each of which was ruled by an Underlord, responsible to the King for revenue and soldiers, in times of need. These Underlords became the units of government and increased their strength and power at the expense of the King above, and at the expense of their vassals beneath, so that by a gradual process their allegiance to the King was lessened and their oppression of the people was greatly extended. This intolerable situation extending through the centuries was the proximate cause of the French Revolution, but that is another story.

When William, the Norman, defeated Harold at Hastings he brought over to England this system of feudal tenure, and he proceeded to parcel out the counties and castles to underlords, usually of Norman extraction. Through successive reigns until the crowning of John, there had been a conflict between the Kings and the Barons as to their respective rights of government, of taxation and of the administration of justice. This conflict between the Royal prerogative and the rights of the people, between centralized government and local government, has existed in every country and in every age, and is no less potent today than it was then.

#### JOHN LACKLAND

John was born when his father was an old man, and he, having parceled out his dominions to his children, had nothing left for his youngest son. John was thereupon surnamed *Sans Terre*, or Lackland. The story of his character development, and of the methods pursued in his acquisition of territory might be the subject of an interesting paper in itself. It is sufficient to say that upon the death of his brother, Richard, the Lion Hearted, John claimed the throne of England and of the French provinces of Normandy, Aquitaine and Poitou, and established his superior rights by the capture of the legitimate heir, who subsequently died a mysterious death.

John, having spent most of his life in the provinces of France, seemed to be more interested in their continued subjection than in the rule of England itself. This policy resulted in almost continual wars. Under the feudal system the Barons in England were called upon to furnish fighting men, and upon their failure to do so, John levied a tax upon each Knight's fee, with exacting periodical certainty and in increasing amounts, more often and greater than any of his predecessors had ever done. And the collection of such taxes as could be made



under these levies was still insufficient to pay the expenses of his wars, and of a profligate and extravagant court.

It must be borne in mind also that the Pope at Rome not only asserted complete authority over the spiritual affairs of the Christian Nations, but that he likewise asserted authority over their temporal affairs as well, and that under the enormous development of a religious hierarchy the church had acquired vast wealth in both real and personal property, which extended throughout the length and breadth of the land. The church asserted, and actually held, jurisdiction, not only over these vast properties, but over the estates of deceased persons and wards. The ecclesiastical courts were called upon for the administration of justice, and all of these things, coupled with its control over the emotions of its religiously inclined communicants, tended to the increase of its wealth and the aggrandizement of its property.

Upon the death of the Archbishop of Canterbury, the monks asserted the right to elect his successor, which they proceeded to do, and immediately sent him to Rome to procure the blessing and approval of the Pope. This right of election was not one that the King recognized, at least where it did not conform to his wishes, and he thereupon proceeded to hold an election according to his own plans and inclinations, and sent a delegation to Rome for the purpose of securing the blessing and approval of the Pope for this selection. The Pope, being an astute politician, declined to recognize either aspirant and proceeded to appoint Stephen Langton and sent him to England for the purpose of taking charge of the affairs of the Church of Rome there. John refused to recognize the appointment of Langton, or to permit him to land in England. The Pope thereupon excommunicated John and declared him to be an outlaw and released every subject from fealty to him. After unsuccessful attempts to overcome the tremendous handicap which this situation created, John abjectly surrendered and gave his entire Kingdom to the Pope and received it again from the hands of his Legate as a vassal, owing superior allegiance to the spiritual power. After taking the oath of the Crusade, in order to escape personal violence at the hands of his subjects, he was nevertheless forced to grant to his Barons the great document called the Magna Charta. Within a few months after its signature, John appealed to Rome, claiming that the document was signed under duress, and the Pope thereupon annulled the instrument, and excommunicated the Barons and all of the subjects of John who should attempt in any manner to enforce the provisions of the document.

The lower classes of the people were subjected to the oppression, not only of the King but of the Barons and their overlords as well. And the procuring of justice for the people was a matter of extreme importance to them, but very difficult to obtain. The Barons administered a form of crude justice in the manorial courts, the Church administered a form of justice in its ecclesiastical courts, and the King had extended the jurisdiction of his court which had originally only included his own vassals, until it included civil and criminal jurisdiction over all of the subjects of the Kingdom. Litigation in the courts was not only expensive to the litigant, but was a source of large revenues to the governing body through whom the courts function, and thereupon a sharp conflict arose between the ecclesiastics, the King and the Barons as to their respective jurisdictions, all to the consequent expense and injustice of the litigant.

Upon the death of John, however, Henry III, a mere child, ascended the throne, and under the guardianship of William Marshall, the Great Charter was re-enacted, and by subsequent recognitions by Kings and Parliaments, it has become the predominating instrument of English constitutional government, shedding its influence over the entire world, particularly in America, which has its inheritance from Anglo-Saxon people and in Anglo-Saxon liberties.

#### CAUSES OF MAGNA CHARTA

From this brief summary, it may be shown that the following were the primal causes that produced Magna Charta:

I. The conflict between the royal prerogative on the one hand and the rights of the people on the other.

II. The conflict between a strongly centralized government typified by the rule of John on one hand and local government typified by the rule of the Barons on the other.

III. The problem of taxation.

IV. The administration of exact justice.

V. The influence of religion.

And these same problems were present when Charles I was forced to grant the petition of rights; when William III approved the act of Parliament, called the "Bills of Rights"; when George III, after the surrender of Cornwallis at Yorktown, was forced to recognize that the Declaration of Independence would in truth and in fact free the American provinces from the domination and control of the English king, the English ministry, and the English government forever. These same problems, in modified form, exist in every nation today, and

their presence can be easily detected by the student of the government of America.

### I. PREROGATIVE VS. THE PEOPLE

It may be stated as a general proposition, that the end of government is the happiness of the people. Washington said, "The aggregate happiness of society is or ought to be the end of all government." These ends are set forth in the preamble of the constitution. As Jefferson puts it, "The only orthodox object of the institution of government is to secure the greatest degree of happiness possible to the general mass of those associated under it." Kings and Emperors have not always recognized this, and neither have Parliaments nor Congresses, and when they fail to do so, the government becomes a despotism, the rights of the people become insecure, and the happiness of the people becomes uncertain and unsafe. There is, and has always been a school in government which believes that the ruler, whether that ruler be a man or a ministry or a parliament, derives its power from some source higher than the people, and that the people have only such rights and privileges as the government may, of its own free will, accord to them. This was the belief of John. He said that he ruled by divine right, that he could do no wrong, and the people, in a more or less limited way, acceded to his theory. Magna Charta established the fact, which English people, before that time and since, have always asserted, that there is a power on earth higher than that of the King, and that the King's rule, as well as his very crown itself, is subject to the suffrage of the citizenry. It is true that there has been a sharp conflict between the students of Magna Charta as to whether or not the instrument reacted to the advantage of the Barons alone, or to the advantage of the Barons and the people as well. The early authorities contended that it was meant to include every citizen of England, but other students equally as profound, have concluded that no citizen of a lower class in England than a Freeman derived any benefit from its provisions. This conflict in theory shall not here be considered. It is sufficient to say that the King's prerogative was made to bow down in submission to the rights of the people. This same situation resulted in the granting of the petition of rights, and in the signing of the Bill of Rights, and of the Declaration of Independence; and in the Constitution of the United States it is expressly provided that the rights of the people shall be supreme. But even today there are in America students of government, so called, who contend that the Congress of the United States

shall be clothed with full, complete and exclusive power to pass upon the validity of its own acts. If such a development occurs, the rights of the people will be subject to the superior power of the Congress of the United States, without control, except in revolution.

## II. CENTRALIZATION VS. LOCAL GOVERNMENT

The second problem that produced Magna Charta was that of local government or the conflict between the King and his Ministry on one hand and the Earls, Sheriffs and Barons on the other. Prior to the conquest, no sovereign had been able to establish in England the supremacy of a central government, but when William came over he soon, by the strength of his arms, brought every county in England under his subjection, and he alone became the government. He re-organized the system of provincial rulers. His representative in each county became the Sheriff, appointed by him, and the authority of the Earl was correspondingly lessened. Under weaker Kings the Sheriffs increased their power and attempted to make their office hereditary; under Stephen, the Earls set out to capture the office of Sheriff as well. In the signing of Magna Charta, King John recognized the right of the people in the various counties to at least some degree of self-government. McKechnie, in his authoritative work upon Magna Charta says: "Every age has to face in its own way a group of difficulties essentially the same, although assuming different names as home rule, local government or federation; problems as to the proper nature of the local authority, the extent of its powers, and its relation to the central government, require constantly to be restated and solved anew."

Throughout the history of American government, this has perhaps been its greatest problem. The failure to solve it during the War of the Revolution made ultimate success, under the leadership of Washington, a miracle; the failure to solve it during the period succeeding the Revolution resulted in the utter collapse of the government under the Articles of Confederation. The Constitution of the United States furnished the wisest and best solution so far devised, and so long as the proper balance between the Federal government and the States was and is and shall be maintained, the security of this government shall continue. There is, however, at the present time, a marked tendency among those who style themselves Democrats, as well as those who call themselves Republicans, toward a strong centralization of power looking to the complete eradication of State lines, and a division



of the country into Federal areas. This tendency is noticeable in the amendments to the Constitution already adopted providing for the direct election of senators and for prohibition and for universal suffrage, and through such acts of Congress as the Migratory Bird Act, the Narcotic Act, the Mann Act, the Highway Act, and the Railroad Commission Act, and through proposed amendments to the constitution such as the one providing for the control of child labor.

### III. TAXATION

The third problem that produced Magna Charta was the problem of taxation. Some political philosopher has stated that taxation is the cause of all governmental problems. It may be stated as a general proposition that the people should only be taxed for the purpose of raising revenues for the carrying on of essential governmental functions. John called upon his Barons for the furnishing of soldiers for his wars in France. They denied the right of the King to call upon them for war in foreign lands. They refused to go and they refused to pay the tax in lieu thereof, called a scutage. This tax had been levied by former Kings at infrequent intervals, and at the rate of one mark per fee. John averaged a levy of the same tax almost once every year during his reign and increased the rate to three marks per fee. In addition to the scutage, he levied large taxes against estates, and cities, and traders, and the Jews, until the burden became so oppressive that relief was necessary. And so in Magna Charta the basis is laid for the principle that no taxes should ever be assessed, except upon the authority, and by the approval of the representatives of the people.

Direct taxes to Municipal, County, State and Federal government have increased to enormous proportions. Indirect taxes, if they could be traced or measured, would probably equal the direct taxes, and it has been variously estimated that every American citizen pays from ten per cent to thirty per cent of his income toward the upkeep of government. This is, therefore, a problem today no less important than it was during the reign of King John.

### IV. JUSTICE

It is provided in Chapter 40 of Magna Charta:

To no one will we sell, to no one will we refuse or delay right or justice.

And in Chapter 45 it is provided:

We will appoint as Justices, Constables, Sheriffs, or Bailiffs, only such as know the law of the realm and mean to observe it well.

This problem was present when the Declaration of Independence was written, because it is charged therein: "He (George III) has made Judges dependent on his Will alone, for the tenure of their offices, and the amount and payment of their salaries." That this problem is no less important today is perfectly apparent to every man, and an analysis of the two provisions of Magna Charta above referred to show that every abuse therein attempted to be corrected is existent today. It is openly charged that success in litigation goes to the rich man, and this charge is to a large extent substantiated by facts. It is perfectly apparent to every lawyer that the delay in the trial of litigation often amounts to a denial of justice. It is apparent, too, that many judges sit upon the bench who do not know the law of the realm, but it is only in isolated cases that a judge can be found who does not mean to observe it well. This problem of exact justice was solved to a large extent in the Federal Constitution, which provided for the appointment of judges during good behavior, at a competent salary, and gives them large discretion in the administration of their courts, and in the trial of cases that come before them. The solution in the State courts, however, seems to be far in the future. Judges are elected for short terms, and many of them spend their tenure on the bench in political machinations, looking to a re-election. These Judges do not receive a competent salary, and it is frequently the case that the men most learned in the law and best competent to administer justice cannot make the financial sacrifice necessary to their service upon the bench. It is further true that a Judge has but slight authority in the trial of cases, either civil or criminal, and that he is but little more than an umpire in disputes between litigants that come before him. It is contended that Judges in the State courts should serve during good behavior, should receive a competent salary and should have the authority to comment upon the credibility of the witnesses and the weight to be given their testimony, certainly to a limited degree.

#### V. RELIGIOUS INTOLERANCE

The last of these problems was then, as now, dangerous but merely incidental. It was provided in Magna Charta that the Church should be free, but it took centuries of conflict before the government was

freed from the Church. To the student of history, the influence of religion, and so-called religion, both for good and bad, is immeasurable, and in the Constitution of the United States, and in the constitution of every State in the Union, it is generally provided for complete separation between the Church and the State. During the reign of King John religion was used as a cloak to aid and assist in the perpetration of unjust and unwise abuses. And it has also been in all ages, the practice of many people, desiring to place a cloak of sanctity about their misdeeds, to perpetrate them in the name of religion, but this likewise is another story.

#### THE INFLUENCE OF MAGNA CHARTA

The influence of Magna Charta upon English law and history and tradition is immeasurable. If it is not the historical basis upon which the common law is built, it is certainly the traditional basis, and tradition has as much or more to do with the nation's ideas and national ideals as history itself. This influence is no less potent in America than in England, and our institutions are indelibly stamped with the traditions of Magna Charta. It is there provided that taxes shall not be levied except in accordance with the law of the land. In Magna Charta it is written that "No Freeman shall be taken or imprisoned, or be disseised of his Freehold, or Liberties, or free Customs, or be outlawed or exiled, or any otherwise destroyed, nor will we pass upon him nor condemn him except by the lawful judgment of his peers or by the law of the land." This phrase, "the law of the land," has in spirit been embodied in the constitutions of this Nation and of its several States, and in the fundamental law that protects the lives and the property and the liberty of their citizens. Under the phrase, "due process of law," Mr. Justice Hawkins, in the case of *Mabee v. McDonald*, 107 Tex. 139, 175 S. W. 676, discusses the proposition interestingly and extensively, and quotes from the argument of Webster in the Dartmouth College Case, "by the law of the land is clearly intended the general law; a law which hears before it condemns, which proceeds upon inquiry and renders judgment only after trial. The meaning is that every citizen shall hold his life, liberty, property and immunities under the protection of the general rules which govern society."

In the case of *Bank v. Okely*, 4 Wheaton 235, Justice Johnson says: "As to the words from Magna Charta incorporated into the Constitution of Maryland, after volumes spoken and written with a view to their exposition, the good sense of mankind has at length settled down

to this; that they were intended to secure the individual from the arbitrary exercise of the powers of government, unrestrained by the established principles of private rights and distributive justice."

In the dissenting opinion of Justice Harlan in the case of *Hurtado v. California*, 110 U. S. 516, the relation of Magna Charta to American jurisprudence is extensively discussed. He calls attention to the fact that "in the Congress of the colonies held in New York in 1765, it was declared that the colonies were entitled to all the essential rights, liberties, privileges and immunities confirmed by Magna Charta to the subjects of Great Britain." He goes on to say, "Magna Charta, upon which rested the rights, liberties and immunities of our ancestors, was called, said Coke, 'the Charter of the liberties of the Kingdom, upon great reason, because it makes the people free.' Hallam characterizes the signing of it as the most important event in English history, and declares that the English instrument is still the keystone of English liberty. 'To have produced it,' said Mackintosh, 'to have preserved it, to have matured it, constitute the immortal claim of England upon the esteem of mankind.' " "Due process of law" is also discussed in the cases of *Twining v. New Jersey*, 211 U. S. 79, and *Frank v. Mangum*, 237 U. S. 308.

While Magna Charta stated the pre-existing rights of English freemen, and while its execution was perhaps an inevitable development in the progress of the law, yet it indelibly and forever stamps in a solemn pact or charter, the principles upon which Anglo-Saxon governments everywhere have been built. And when, in remote centuries to come, Nations' boundaries shall be erased, and realigned, and Nations themselves shall pass into the Valhalla of departed hopes, when the tumult and the shouting dies and the captains and the Kings depart, there shall be raised upon pinnacles reaching to the sky, so that all nations and all people and all generations shall behold it, the great charter of liberty, Magna Charta.

"Thou who the verdants plain doth traverse here,  
Whilst Thames among the willow from thy view  
Retires, O stranger! stay thee, and the scene  
Around contemplate well. This is the place  
Where England's ancient Barons, clad in arms  
And stern with conquest, from their tyrant King  
(Then rendered tame), did challenge and secure  
The Charter of thy freedom. Pass not on  
Till thou hast bless'd their memory, and paid  
Those thanks which God appointed the reward  
of Public Virtue. And if chance thy home  
Salute then with an honored father's name,



Go, call thy sons;—instruct them what a debt  
 They owe their ancestors; and make them swear  
 To pay it, by transmitting down intire,  
 Those sacred rights to which themselves were born.”  
 —*Mark Akenside.*

*Chas. D. Turner.*

Dallas.

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## MASSACHUSETTS TRUST,—A SEQUEL

At last the Supreme Court of Texas has decided four of the numerous cases pending in the Texas courts involving the law of the business trust.<sup>1</sup> It is very gratifying to the writer that the Supreme Court of Texas in deciding these cases followed his prediction in holding the shareholders in a business trust liable for the debts properly incurred by the trustees in the conduct of the business.<sup>2</sup> However, he frankly admits that the court went far beyond anything he ever imagined in his wildest dreams. But what is said concerning these opinions is directed not so much at the result reached by the court as the means by which the court arrived at its conclusions, not intending in the least to criticize the court, but with the hope that when subsequent cases come before the court involving the business trust it will have more time to investigate the law and correct at least three serious mistakes that it seems to the writer were made in the opinions.

It is evident from what the judge said in his opinion in *Thompson v. Schmitt* that the court decided that the shareholders in even a pure trust are liable for all obligations of the trustees incurred in conducting the business of the trust, and the court gave little heed to the means of arriving at this liability. In the above opinion the court says: "We have neither time nor inclination further to consider the abstract question of what might or might not be the rule for the decision of the case in a sister state." The writer feels fairly confident that when the question is again presented to our Supreme Court it will not go as far as it did in the four cases cited above in holding that the shareholders are liable even though the creditor knows that the trustees are exceeding their authority in creating the obligation. This, however, is the extremity to which the Court went in both the *Thompson-Schmitt* and the *Victor Refining Company-City National Bank* cases. Surely the court meant to limit their decisions to a business trust,—in other words, to a case where men contribute money, property or skill in conducting a business and are entitled to the profits in certain proportions. The present writer cannot believe that the court intended to overthrow the doctrines of the ordinary trust which have been so long recognized

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<sup>1</sup>*Thompson v. Schmitt et al.*, 274 S. W. 554 (114 Tex., June, 1925); *Victor Refining Company v. City National Bank of Commerce et al.*, 274 S. W. 561; *Hollister et al. v. McCamey*, 274 S. W. 562; *How et al. v. Keystone Pipe and Supply Company, Limited, et al.*, 274 S. W. 563.

<sup>2</sup>2 TEXAS LAW REVIEW, 165-178; 1 TEXAS LAW REVIEW, 159.

by Anglo-American law. But even this point is now doubtful for the reason that the court intimated that if there was any conflict between its decision in the *Thompson-Schmitt Case* and the decision in *Connally v. Lyons & Company*<sup>3</sup> it would not adhere to the doctrine set forth in the latter case. The only point involved in the *Connally-Lyons Case* was whether a trustee appointed by the court to conduct a business was individually liable for the obligations that he created. That the trustee is liable in such a case is settled by an unbroken line of decisions in America, England, and the rest of the English-speaking world.<sup>4</sup>

In *Thomspon v. Schmitt* the declaration of trust provided that "The title to all property was to vest in named individuals (the trustees) and their successors, in trust for the holders of the certificates of beneficial interest. The articles expressly granted to the trustees complete power and authority to do business under the name of Dixie Co-operative Mail Order House. The article granted to the holders of certificates of beneficial interest the right to inspect an accurate record of all receipts and disbursements to be kept by the trustees, the right to receive dividends, and on termination of the association the right to have a division of principal and accumulated profits."

In other words, the title to all of the trust property was vested in trustees, and the shareholders reserved no control over them but merely stated in the declaration of trust three of their legal rights as cestui que trust of the property. Yet in the opinion at the very outset the court says: "Looking to the substance of the written articles . . . we see no escape from the conclusion that the holders of certificates of beneficial interest were persons who were to furnish capital for a mercantile business to be operated for their joint account and for their mutual profit, and to be conducted by their *chosen agents*." Throughout the entire opinion the court bases its decision on the proposition that the trustees were the agents of the shareholders. If this is true, the court's discussion of other points in the decision is pure dictum. But ~~was~~ the court justified in reaching this conclusion where the facts show conclusively that the title to all the property of the trust was vested in the trustees and the stockholders reserved not a vestige of control over them? Should the court not have said that the trust instru-

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<sup>3</sup>82 Tex. 664, 18 S. W. 799, 27 Am. St. Rep. 935 (1891).

<sup>4</sup>*Taylor v. Davis*, 110 U. S. 330, 28 L. Ed. 163, 4 Sup. Ct. 147 (1884); 2 TEXAS LAW REVIEW, 140-154.

ment formed the relation of trust and cestui que trust, and on this basis determined the rights of the creditor?<sup>5</sup>

The court defines an agent as "one who acts in my behalf, for my advantage, and by my authority." Webster defines behalf as "advantage, favor, stead, benefit, interest, profit, support, defense, vindication." The court must have intended to give to the word "behalf" its ordinary meaning of "advantage or interest." For if it meant "in my stead," it should have added "and subject to my right to control the manner of doing the work." The only possible way to harmonize the above sentence with any definition of the term "agent" is to say that the court meant "agent" when it used the word "behalf," and then the court begs the question. Would it not have been more satisfactory had the court applied the usual test for determining the relation between the trustees and the shareholders? In other words, if the court had said that the right to control the manner of doing the work determines whether the relation is principal and agent on the one hand or employer and independent contractor on the other, but if the other party is entrusted with title to property and is to carry on a business for the one who has the beneficial interest in the property and the latter party has no control over the manner of conducting the business the relation is that of trustee and cestui que trust. Under the court's test every independent contractor and every trustee are agents.

Another peculiarity of the court's opinion is that it cites the Texas case of *Goode v. McCartney*,<sup>6</sup> decided three years before the case of *Cox v. Hickman*,<sup>7</sup> in which the court expressly follows the old English rule of profit sharing set forth in *Waugh v. Carver*<sup>8</sup> and *Grace v. Smith*,<sup>9</sup> and the case of *Cothran v. Marmaduke*,<sup>10</sup> which also expressly follows the old English rule to the effect that there is a difference between a partnership inter se and as to third parties. The reason usually given for the old English doctrine is that he who shares in the profits of the business takes from that fund which the creditor relies upon for the satisfaction of his obligation, or as stated by the

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<sup>5</sup>In 26 YALE LAW JOURNAL, 169, Professor Corbin says: "In the study and the practice of the law, our constant problem is: What legal relations are the result of facts that occur?" Should our court not have been more careful in determining the resultant legal relations in the above cases?

<sup>6</sup>10 Tex. 193 (1853).

<sup>7</sup>8 H. L. Cas. 268 (1860).

<sup>8</sup>2 H. BL. 235 (1793).

<sup>9</sup>2 WM. BL. 998 (1775).

<sup>10</sup>60 Tex. 370 (1883).



court in the instant case "where the profits themselves were property to which creditors would have a right to resort before their distribution." In *Cothran v. Marmaduke* the defendant advanced money to a partnership and agreed to take a certain per cent of the profits in lieu of interest. In this opinion the court quotes from Story on Partnership, Section 58, where the old test for determining whether there is a partnership as to third parties is set forth. In 1860, in England, by the celebrated case of *Cox v. Hickman* this test was exploded, and most courts in America now follow the present English doctrine. Long since it has been shown that the old English doctrine was never based on sound reasoning as the creditors must be paid before there can be any profits.

After expressly approving the case of *Cothran v. Marmaduke* the court in the instant case says: "There is no substantial difference between the rule in Texas and that announced in *Meehan v. Valentine*."<sup>11</sup> The facts in *Meehan v. Valentine* are the same as those in *Cothran v. Marmaduke*. In both cases the defendant lent money to a partnership and the creditor of the partnership was seeking to hold him liable on the ground that he became a partner in the firm since he agreed to take a certain per cent of the net profits in lieu of interest. In *Meehan v. Valentine* one of the partners testified that the money advanced "was capital he had in the business the same as ours . . . we owe it to him if we do not lose it." But in this case the Supreme Court of the United States held that the defendant did not become a partner because the written instrument showed clearly that he advanced money to the firm and agreed to receive ten per cent of the net profits in lieu of interest, and was not a principal in the business since he was given no control over the manner of conducting it. In this opinion the Supreme Court of the United States expressly repudiates the old English doctrine of sharing profits, and held that if the defendant was not a principal in the business of the firm he was not a partner. We, therefore, have the Supreme Court of Texas citing two cases with approval, one following the old English rule that he who takes part of the profits of a business becomes a partner as a matter of law as to third parties, the other the modern English holding of *Cox v. Hickman*. It is evident, therefore, that this part of the court's decision is correct only if it is true that opposites are the same. Most lawyers in Texas thought that

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<sup>11</sup>145 U. S. 611, 36 L. Ed. 835, 12 Sup. Ct. 972 (1892).

when the Commission of Appeals decided the case of *Fink v. Brown*,<sup>12</sup> approved by the Supreme Court of Texas, the old English rule expressly approved in *Cothran v. Marmaduke* had been once and for all time repudiated in Texas. In the case of *Fink v. Brown* a landlord rented property and agreed to take a per cent of the profits of the lessee's business in addition to a cash rental. In this case the Commission of Appeals expressly approved the present English holding and repudiated the old doctrine of *Waugh v. Carver* and *Grace v. Smith*. The Supreme Court of Texas in the instant case did not cite *Fink v. Brown*, nor did it cite the case of *Buzard v. Bank of Greenville*.<sup>13</sup> In both of these cases the court held that merely sharing in the profits of a business does not make one a partner even as to third parties. Looking at the result of the court's opinion in the instant case it is fairly evident that it now approves the old doctrine of profit sharing and refuses to follow the present English holding of *Cox v. Hickman* and *Bullen v. Sharp*.<sup>14</sup> Therefore, if one lends money to a partnership or to an individual and receives a per cent of the net profits in lieu of interest, or if an agent is employed by a partnership or person, and receives a certain per cent of the net profits in lieu of salary, or if a landlord rents property and receives a certain per cent of the net profits of the business of the lessee in lieu of a monthly or yearly rental, this one becomes a partner and personally liable for all the debts of the owner of the business even though one is not given any right to act as a principal in the conduct of the business. This part of the court's opinion has thrown into utter confusion the law of partnership in Texas.

In the third place, our Supreme Court holds that the shareholders in a pure trust are liable as partners because in 1846 the First Legislature of Texas passed our limited partnership statute, and the Twelfth Legislature in 1871 passed our general incorporation statute.<sup>15</sup> Our general incorporation statute was passed by the Twelfth Legislature in 1871, but, as it contained no enacting clause, its invalidity was admitted by all, and a valid statute was finally passed in 1874. The Court holds that because of the above statutes no one can be interested directly or indirectly in a business without being personally liable for its obligations. The court seems to hold that by reason of our limited partnership and corporation statutes the Legislature re-

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<sup>12</sup>215 S. W. 846 (Tex. Com. App., 1919).

<sup>13</sup>67 Tex. 83, 2 S. W. 54, 60 Am. St. Rep. 7 (1886).

<sup>14</sup>L. R. 1 C. P. 86 (1865).

<sup>15</sup>7 GAMMEL'S LAWS, 68 (Dec. 2, 1871).

pealed by implication all rules of the common law which permit one to be interested in a business without being liable for its obligations. The writer has examined very carefully the Journals of the House and Senate of both the First and Twelfth Legislatures and finds that no such intent was in the mind of any legislator. Our limited partnership act originated in the House of Representatives April 6, 1846. On that day Mr. Howard introduced the following resolution:

*Resolved*, That the Committee on the Judiciary be instructed to inquire into the expediency of a law to establish limited partnerships . . . with leave to report thereon by bill or otherwise.

On the above date this resolution was read and adopted.<sup>16</sup> On April 15, 1846, Mr. Gray, Chairman of the Committee on the Judiciary, made the following report:

Committee Room,  
April 14th, 1846.

*To the Honorable Speaker of the House of Representatives.*

SIR: The committee on the Judiciary, in pursuance of the Resolution (of the House) instructing them to inquire into the expediency of a law, to establish limited partnerships—with leave to report thereon, by bill or otherwise—beg leave to submit the following report:

They consider the enactment of such a law to be a measure of great importance. Under such a law, much good will result to the community, by the investment of capital, in various kinds of enterprises; and will also relieve the Legislature from a vast amount of labor and legislation, in the consideration and enactment of laws creating private Corporations.

They report the enclosed bill, to be entitled, An Act for the regulation of limited partnerships; the provisions of which, founded on the civil law, have been found to work well in other states.

On the above date the bill was read the first time.<sup>17</sup> The bill was subsequently passed by the House and the Senate.<sup>18</sup>

Our general incorporation statute was the result of a concurrent resolution introduced in the House of Representatives by Mr. Camp on the 25th day of January, 1871, as follows:<sup>19</sup>

<sup>16</sup>HOUSE JOURNAL, FIRST LEGISLATURE, STATE OF TEXAS, p. 355.

<sup>17</sup>Pp. 448-449, HOUSE JOURNAL, FIRST LEGISLATURE OF THE STATE OF TEXAS.

<sup>18</sup>See pp. 496, 511, HOUSE JOURNAL, FIRST LEGISLATURE OF THE STATE OF TEXAS, and pp. 49, 251, 257, and 300, of the SENATE JOURNAL OF THE FIRST LEGISLATURE.

<sup>19</sup>HOUSE JOURNAL, TWELFTH LEGISLATURE, p. 107. Pp. 110, 821, 830, 67,

WHEREAS, Innumerable demands are being made upon the Legislature for various charters of a private character; and

WHEREAS, It is apparent that this class of legislation must consume a large portion of the time of this body, to the great detriment of the public interest, therefore

*Resolved*, That the Speaker appoint a committee of five gentlemen learned in the law, to act with a like committee on the part of the Senate, that body concurring, whose duty it shall be, at an early day, to report to this House, a general law, authorizing the police courts of the State, or some other tribunal or authority, to grant all private charters for schools, colleges, academies, bridges, turnpikes, etc., as to them may seem proper when such charters do not require state aid, either in lands, bonds or money.

In pursuance of this resolution the House and Senate appointed a committee that drafted an incorporation statute. The bill was copied from the statute of the State of Kansas<sup>20</sup> and was finally passed by the Twelfth Legislature.

It is evident from the above quotations from the House and Senate Journals that the Legislature passed the limited partnership act and the general incorporation statute for the purpose of granting a privilege to our citizens, for the purpose of putting them on an equality with the inhabitants of other states, and especially to save the time of the Legislature in considering and passing private incorporation acts. There was not the remotest intention on the part of any legislator to repeal by implication any of the common law rules applying to the relation of trustee and cestui que trust. It seems very evident, therefore, that this part of the court's opinion in the instant case and that of the Courts of Civil Appeals in the cases of *Wells et al. v. Mackay Telegraph-Cable Company*<sup>21</sup> and *McCamey v. Hollister*<sup>22</sup> are entirely erroneous, and assume too much.

There is no justification for the court's position as to the intent of the Legislature in passing the above statutes, and the court violated the rule of construction that a statute or the common law is not repealed by implication. It might as well be argued that in Texas all children born in lawful wedlock are illegitimate, because the Legislature of Texas passed a statute permitting the adoption of an heir, as to argue that the Legislature intended by implication to repeal all the common

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195, 728, 1039, 1350, HOUSE JOURNAL OF TWELFTH LEGISLATURE, also SENATE JOURNAL OF THIRTEENTH LEGISLATURE, pp. 1078, 114, 1122, 1143, 1158, 1159, 1202, 1216, 1231.

<sup>20</sup>*Ramsey v. Todd*, 95 Tex. 614, 69 S. W. 133, 93 Am. St. Rep. 875 (1902).

<sup>21</sup>239 S. W. 1001 (Tex. Civ. App. 1921).

<sup>22</sup>241 S. W. 689 (Tex. Civ. App. 1922).



law rules applying to the relation of trustee and cestui que trust by the passage of our limited partnership and corporation statutes. In other words, the Legislature by the passage of the above statutes intended to augment, rather than diminish, the common law rights, powers, and privileges of our citizens.

When the court reached the conclusion that the shareholders in a business trust are liable for the debts of the trustees it should have followed the case of *Hardoon v. Belilios*<sup>23</sup> rather than overthrow the entire doctrine of trusts in Texas. The *Hardoon v. Belilios* case held that the cestuis que trusts are under an obligation to reimburse the trustees for all reasonable obligations and expenses incurred in the conduct of the business, and also for all torts for which they are not personally to blame. By this means the court would have followed the beaten path of the law, and the shareholders would ultimately have been responsible for the debts of the trustees if the trust property was not sufficient to pay them, provided in creating the obligations the trustees acted fairly and within their powers as set forth in the declaration of trust. But from the court's discussion in the *Thompson-Schmitt Case*<sup>24</sup> and especially the *Victor Refining Company-City National Bank of Commerce Case*,<sup>25</sup> it seems as though the Supreme Court of Texas means to hold that the shareholders in a pure trust are responsible for every debt created by the trustees, even though the creditors know that in incurring the obligations the trustees violated a plain provision in the declaration of trusts.<sup>26</sup> This cannot be the law.

In the opinion the court went so far as to say "that our statutes forbid any attempt to lower the liability of the holders below that of general partners." The court, then, has read into our limited partnership and corporation statutes a provision that "any attempt to lessen one's individual liability is illegal unless the above statutes are complied with." If this is true, it would logically follow that a contract by the creditor to look only to the assets of the trust for the satisfaction of his obligation and not to the shareholders would be in the teeth of the statute and therefore illegal. The Court of Civil Appeals at Galveston upheld such a contract<sup>27</sup> and many other courts have

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<sup>23</sup>A. C. (1901), 118.

<sup>24</sup>274 S. W. 554 (1925).

<sup>25</sup>274 S. W. 561 (1925).

<sup>26</sup>2 TEXAS LAW REVIEW, 148-154; *Bouchard v. First People's Trust*, 148 N. E. 895 (Mass. 1925).

<sup>27</sup>*Industrial Lumber Co. v. Texas Pine Land Assn.*, 31 T. C. A. 375, 72 S. W. 875 (Tex. Civ. App. 1903).

reached the same conclusion.<sup>28</sup> And Justice Gill, in the *Industrial Lumber Company Case*, in speaking of our limited partnership statute, says, "The statute merely confers a power. It does not limit or destroy any common law right."

All authorities agree with Professor Burdick in saying "The principal object which legislators had in view in authorizing limited partnerships, was the encouragement of trade."<sup>29</sup> In the language of a leading case on the subject, 'Looking, then, to the statute as a whole, and its history, in connection with the then condition of commercial law, we find a clear, general purpose and intent of the legislature to encourage trade.'<sup>30</sup> The same view has been expressed by other courts,<sup>31</sup> and by the draftsman of the Uniform Limited Partnership Act.<sup>32</sup> There is no conflict in the authorities on this point. How the Supreme Court of Texas unveiled the intent of the Texas Legislature in passing the limited partnership and corporation statutes, is a mystery. If any Texas lawyer ever had any misgivings as to the meaning of "legislative intent" they have now been dispelled by the court in the above opinions.

In the instant case the Supreme Court cites, seemingly with approval, the opinion of Judge Gill in the *Industrial Lumber Company Case*. That case upheld the validity of a contract by which the creditor agreed to look to the assets of the company for the satisfaction of his debt and not to the stockholders individually. Surely our court will not hold the above contract illegal. But at this time no one can be certain about its holding on this point, since it gave no weight to a provision in the declaration of trust in both the *Thompson-Schmitt* and *Victor Refining Company-City National Bank* cases, which provided that the creditors would look only to the assets of the trust for the satisfaction of their debts, even though the creditors had actual notice of this provision. In a pure trust the court should hold the trustees liable for obligations they create and consider the above provision in determining whether the trustees have the right of reimbursement under the rule stated above and discussed in detail in a previous number of the REVIEW.<sup>33</sup>

<sup>28</sup>First National Bank v. Watkins, 154 Mass. 385, 28 N. E. 275 (1891); Wells v. Flynn, 184 N. W. 389 (Iowa, 1921), 17 A. L. R. 710. See notes.

<sup>29</sup>BURDICK ON PARTNERSHIP, 3rd Ed., p. 386.

<sup>30</sup>Clapp v. Lacey, 35 Conn., 463 (1868).

<sup>31</sup>Singer v. Kelley, 44 Pa. 145 (1863); Riper v. Poppenhausen, 43 N. Y. 68 (1870).

<sup>32</sup>INTRODUCTION, p. 5.

<sup>33</sup>2 TEXAS LAW REVIEW, 165.

In the *Thompson-Schmitt* and *Victor Refining Company* cases the court held the shareholders liable because "exemption from personal liability on the part of shareholders . . . can be secured only by compliance with our statutes governing limited 'partnerships' and corporations."<sup>34</sup> In these two cases the court expressly refused to consider the law of any other state in determining the liability of the shareholders and whether the "declaration of trust" formed a joint stock company or a pure trust.<sup>35</sup> But in the *Hollister-McCamey Case*<sup>36</sup> it determined the liability of the shareholders by following the Massachusetts test for determining whether the association is a pure trust or "a partnership." In this opinion the court says: "The trustees were empowered to do any act necessary or proper to effect the purposes specified, either in the declaration of trust or in any amendments thereof, and the shareholders by majority vote, could alter or amend the declaration of trust. The trustees were, therefore, certainly subject to the control of the certificate holders, and under the decisions of the Supreme Judicial Court of Massachusetts the company would be regarded as a partnership."<sup>37</sup>

Throughout the above opinions the court says that the stockholders in a pure trust and an association in which the shareholders reserved some control over the trustees are "partners." If this is true, the partners could not sue or be sued in the partnership name.<sup>38</sup> As these companies always issue shares of stock, fix the amount of each share, provide that the death of a shareholder or the sale of his interest does not dissolve the association, and that the business shall be carried on either by directors who are elected at stated periods or by trustees who fill all vacancies, it is evident that these associations are joint stock companies rather than "partnerships." If this is true, they can sue and be sued as provided for by Articles 6149 to 6154, inclusive, REVISED STATUTES OF TEXAS, 1911.<sup>39</sup>

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<sup>34</sup>274 S. W. 562 (1925).

<sup>35</sup>274 S. W. 559 (1925).

<sup>36</sup>274 S. W. 562 (1925).

<sup>37</sup>For the above propositions the court cites the following cases: *Neville v. Gifford*, 242 Mass. 124, 136 N. E. 160; *Frost v. Thompson*, 219 Mass. 360, 365, 106 N. E. 1009; *Morehead v. Greenville Exchange National Bank*, 243 S. W. 546 (Tex. Civ. App., 1922); *Feldman v. American Dist. Telegraph Co.*, 257 S. W. 929, 930 (Tex. Civ. App., 1924).

<sup>38</sup>*H. & T. C. R. R. Co. v. Corsicana Fruit Company*, 170 S. W. 849 (Tex. Civ. App., 1914); *Martin v. Hemphill*, 237 S. W. 550 (Tex. Com. App., 1922); *Style v. Lantrip*, 171 S. W. 786 (Tex. Civ. App., 1914); *Law Reporting Company v. Texas Grain & Elevator Company*, 168 S. W. 1001 (Tex. Civ. App., 1914); 1 TEXAS LAW REVIEW, 155.

<sup>39</sup>Articles 6133 to 6138, inclusive, REVISED STATUTES OF TEXAS, 1925.

The foregoing articles provide that "any unincorporated joint stock company or association . . . may sue or be sued." In the recent case of *Bouchard v. First People's Trust*<sup>40</sup> the Supreme Court of Massachusetts held that a pure trust was not an "association" within the meaning of the Massachusetts statute that is similar to that of Texas. In this case the court reiterated the test set forth in the case of *Williams v. Milton*<sup>41</sup> for determining whether the association is a joint stock company or a pure trust. If the Texas court follows the Massachusetts law it will hold that a pure trust is neither "a joint stock company nor an association," and, therefore, cannot sue or be sued,<sup>42</sup> but in view of the holding in the *Thompson-Schmitt Case* the court is almost forced to conclude that a pure trust is a joint stock company and therefore can sue or be sued under the provision of the above article. In the above case the Massachusetts court said, "There is a sound and well-recognized distinction between a voluntary association and an express trust even though both are established by written instruments or declarations of trust, managed by trustees, and the beneficial interest whereof is divided into and represented by transferable certificates or shares."<sup>43</sup>

#### CONCLUSION

From the above opinions by the Texas Supreme Court one is forced to conclude that there is no distinction in Texas between a pure trust and a joint stock company or partnership, and that even though the creditor knows that the agent is exceeding his authority in creating the obligation the members of the trust are liable "as partners." This is contra to many cases and especially to the case of *McCarthy v. Parker*,<sup>44</sup> and the recent case of *Bouchard v. First People's Trust*.<sup>45</sup>

Therefore, even though the declaration of trust provides that no agent has authority to create a debt except where the creditor agrees to look only to the assets of the company for the satisfaction of his obligation and the creditor has full knowledge of this provision, all the stockholders are liable even though, when the debt was created,

<sup>40</sup>148 N. E. 895 (Mass. 1925). Cf. 1 TEXAS LAW REVIEW 138-141.

<sup>41</sup>215 Mass. 1, 102 N. E. 355. See also *Crocker v. Malley*, 249 U. S. 223, 63 L. Ed. 573, 39 Sup. Ct. 270; *Smith v. Anderson*, 15 Ch. Div. 247 (1879).

<sup>42</sup>Revised Statutes of Texas (1911).

<sup>43</sup>See *Graham v. Omar Gasoline Co.*, 253 S. W. 896 (Civ. App. 1923); 23 Col. L. Rev. 423.

<sup>44</sup>243 Mass. 465, 138 N. E. 8.

<sup>45</sup>148 N. E. 895 (Mass. 1925).



the creditor did not expect to hold the members liable. For instance, if a corporation lends the business trust \$10,000, it may hold all of the members of the trust individually liable as partners, even though the trustees who borrowed the money owned 98% of the stock of the corporation and knew all the provisions of the declaration of trust, and when the debt was created all the directors and stockholders of the corporation thought that the above provision in the declaration of trust was binding upon them.<sup>46</sup>

The Texas law is the opposite to that of Massachusetts on several points. (1) In Massachusetts a distinction is made between a joint stock company and a business trust, (2) known limitations on the power of the agent of a joint stock company are binding upon the third party, and (3) a pure trust is not an "association" within the meaning of their statute which permits "a joint stock company or association" to sue and be sued.<sup>47</sup> In Massachusetts in the *Bouchard-First People's Trust* case the court was very careful not to add anything to the statute that was construed in that case. The court there said, "In any event, we can only interpret the statute as enacted without infringing upon the prerogative of the legislative department of government by adding words not used by it." In Texas the Supreme Court (1) added a great many words to our corporation and limited partnership statutes in holding that these statutes prohibit the organization of a business trust in Texas; (2) the court also held that known limitations on the power of an agent are not binding on the third party, and (3) that in Texas there is no difference between a joint stock company and a pure trust. In the recent case of *Continental Supply Company v. Adams*<sup>48</sup> the stockholders reserved no control over the trustees. In fact, under the declaration of trust involved in that case the stockholders had an undivided interest in the oil produced after a royalty was paid to the previous owner of the oil rights and 25% of the remainder was reserved by the trustees for the the purpose of paying the expenses of development. The writer wonders if the Supreme Court will extend its holdings in the above four cases to the declaration of trust involved in this case and hold that the shareholders who are not trustees are liable for all debts of the trust. Surely when the case comes to the

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<sup>46</sup>See *Hardee v. Adams Oil Assn.*, 254 S. W. 602 (Civ. App. 1923); *Dayle L. Smith Oil Co. v. Continental Supply Co.*, 268 S. W. 489 (Civ. App. 1925); *Shelton v. Montoya Oil & Gas Company*, 272 S. W. 222 (Civ. App. 1925).

<sup>47</sup>*Bouchard v. First People's Trust*, 148 N. E. 895 (Mass. 1925); 1 TEXAS LAW REVIEW, 127; 2 TEXAS LAW REVIEW, 139.

<sup>48</sup>272 S. W. 325 (Civ. App. 1925).

Supreme Court of Texas the judges will realize that their position is untenable, and will follow the great weight of authority so admirably set forth in the Massachusetts, as well as other American and English cases. If they fail to do this the writer feels confident that Texas will be in a class by herself, as he does not believe that other courts will follow the extreme holding of the instant cases. Just how far the Supreme Court will carry its holdings no one can predict. For instance, will it hold that the shareholders in a pure business trust are individually liable for torts committed by the trustees in furtherance of the trust business for which the trustees are personally to blame?<sup>49</sup>

It is to be hoped that the next time a case involving the law of the Massachusetts Trust is before our Supreme Court it will clarify the law more than it did in the above four opinions.

*Ira P. Hildebrand.*

University of Texas.

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<sup>49</sup>HARV. L. REV., 275; 2 TEXAS LAW REVIEW, 165-178.

## SUGGESTIONS FOR IMPROVING COURT PROCEDURE IN TEXAS

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Under this general heading will appear from time to time pertinent suggestions for improving and speeding up our judicial machinery. Our readers are invited to send in for publication in this department brief, concrete suggestions, or discussions of suggestions made by others. Communications for this department should be sent to Mr. A. H. McKnight, M. K. & T. Ry. Building, Dallas.—Ed.

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### SUGGESTED FORM OF RECORD FOR PRESENTATION OF CASES TO COURTS OF CIVIL APPEALS

The records for our appellate courts are prolix, and, being prolix, they cost too much. The following form (subject, of course, to modification as the facts of any case may require) is suggested for use in lieu of the present transcript and statement of facts:

A B, APPELLANT,

vs.

C D, APPELLEE.

#### APPEAL FROM BLANK COUNTY

This is a suit for damages on account of personal injuries sustained by appellee while a passenger on one of appellant's cars June 1, 1925. The car collided with a truck at a street crossing. Two grounds of negligence were alleged, first, defective brakes on the car, and, second, a failure of appellant's conductor to keep a proper lookout. Both grounds were denied by appellant. The case was submitted to the jury on special issues and they found against appellant on both allegations. They fixed appellee's damages at \$5,000.00 and judgment was entered accordingly.

Appellant insisted in the trial court, and on appeal contends, that as a matter of law the evidence was insufficient to authorize the court to submit to the jury whether it was negligent with respect to the condition of the brakes. Proper objection to the submission of this issue was made. The testimony on the issue is as follows:

M N, for appellee, testified:

\* \* \* \* \*

R S, for appellee, testified:

X Y, for appellant, testified:

\* \* \* \* \*

The following testimony of appellee's witness Y Z was admitted over the objection of appellant that it is hearsay:

\* \* \* \* \*

The facts bearing on the admissibility of this testimony are as follows:

\* \* \* \* \*

Appellant duly excepted to the court's ruling. No other testimony on the point was given.

In due time the appellant filed its motion for a new trial, containing, among others, the following grounds:

1. The court erred in submitting to the jury Special Issue No. 1, reading as follows:

\* \* \* \* \*

2. The court erred in admitting the following testimony of the witness Y Z over appellant's objection that it is hearsay, as shown by Bill of Exception No. 1:

\* \* \* \* \*

3. The verdict of the jury as to the extent of appellee's damages was arrived at by lot.

The testimony offered upon the hearing of the motion for a new trial in support of the third ground was as follows:

\* \* \* \* \*

Correct:

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Attorney for Appellant.

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Attorney for Appellee.

Approved:

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Judge.

Such statement might be filed in duplicate in the trial court and to comply with Article 2281, REVISED CIVIL STATUTES of 1925, there should be added to it a copy of the final judgment, a copy of the order overruling the motion for new trial, the appeal bond, and a statement of the accrued costs, to constitute the record on appeal.

This record would give a Court of Civil Appeals all it needs and nothing it does not need to determine the real issues in the case. It



would thus conserve the time of both the court and the attorneys, while saving litigants much unnecessary expense.

No doubt this method of appeal has been but little, if any, used because of the fear of attorneys that for technical reasons their cases would not receive due consideration if taken up in this way. There are decisions that give ground for this fear. But the advantages of the method are so obvious that it is hoped the Courts of Civil Appeals will urge its adoption as a matter of theory, and will encourage it in practice when cases involving such statements come before them.

A. H. McKnight.

Dallas.

#### PETITIONS FOR WRITS OF ERROR

The Supreme Court can save the lawyers of Texas much trouble and their clients very considerable expense by adopting two simple rules, as follows:

1. Paragraphs (a) to (j), inclusive, of Rule 1 for the Supreme Court, effective September 1, 1921, including subdivisions (1), (2), (3), (4), and (5) of paragraph (e), are hereby vacated and set aside.

2. Hereafter petitions for writs of error shall be sufficient if they meet the requirements of Article 1740, REVISED CIVIL STATUTES of 1925.

If this were done, a petition requiring ten pages would be exceptional, and most petitions could be written on two, three or four pages. Take the case of *Continental Supply Company v. M., K., & T. Railway Company of Texas et al.*, 269 S. W. 1040, for instance. The petition for writ of error in it contained more than twenty typewritten pages. Under the proposed rules, the following form, omitting the style of the case and signatures, would suffice:

This is an action in trespass to try title brought by defendant in error against plaintiff in error. It was tried without a jury and judgment was rendered in favor of defendant in error for the land in controversy. This judgment was affirmed by the Court of Civil Appeals. In disposing of the case, that court committed errors as follows, which are of such importance to the jurisprudence of the State as to require correction, namely:

1. The court held that a deed to defendant in error, shown on page — of the statement of facts, conveyed title to it, whereas the reverse is true, the land in controversy not being included within the description of that deed.

2. The court erroneously held the United States marshal's deed upon which the plaintiff in error relies void because of the

alleged insufficiency of the description of the land therein. The description reads: "The following described property situated in the county of Eastland and State of Texas, to-wit: 120 acres out of the W. A. Rhoads survey, abstract No. 58, and survey No. 84." Under repeated decisions of this court and the Courts of Civil Appeals, as plaintiff in error construes them, this description was sufficient to admit parol testimony in aid thereof, and the extraneous facts offered to complete the description reasonably identified the land conveyed.

Each of the contentions here urged was presented on the submission of the case in the Court of Civil Appeals and in the motion for rehearing therein. The facts relating to the first question, with the argument and authorities submitted by plaintiff in error in support of its view, will be found beginning on page — of its brief filed in the Court of Civil Appeals, and those relating to the second question beginning on page — thereof.

Wherefore, plaintiff in error prays that this petition be granted and that upon a hearing of the case in this court, the judgments of the Court of Civil Appeals and the trial court be reversed and judgment be here rendered in its favor. It also prays for general relief.

This petition would not impose upon the court a greater burden than that imposed upon it by the petition actually filed. The only difference would be that here the court would look to the brief for the facts, argument and authorities, while there it looked to the petition for writ of error. That difference, however, is not of consequence.

The Association has long been on record as favoring this change in the rules. It is to be hoped that the change will be made without further delay. Perhaps it will expedite the matter if attorneys favoring the change will write the court urging it.

*A. H. McKnight.*

Dallas.

## SUPREME COURT OF THE UNITED STATES<sup>1</sup>

### APPLICATION FOR ADMISSION TO PRACTICE

### PERSONAL STATEMENT OF APPLICANT

1. Name: \_\_\_\_\_  
 2. Date of birth: \_\_\_\_\_ 3. Place of birth: \_\_\_\_\_

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<sup>1</sup>The above rules of the United States Supreme Court, dealing with admission and disbarment were furnished to the Texas Law Review by Attorney Byrd E. White of Lancaster, Texas.

4. Names of parents:
    - (a) Mother's name: \_\_\_\_\_
    - (b) Father's name: \_\_\_\_\_
  5. Residence address of applicant: \_\_\_\_\_
  6. Office address of applicant: \_\_\_\_\_
  7. State courts of last resort to which applicant has been admitted to practice (giving dates of admission): \_\_\_\_\_  
 \_\_\_\_\_
  8. State places where applicant has been a practitioner: \_\_\_\_\_  
 \_\_\_\_\_
  9. Is applicant native born citizen of the United States? \_\_\_\_\_
  10. If not native born citizen, state date and place of naturalization: \_\_\_\_\_  
 \_\_\_\_\_
- Signature of Applicant: \_\_\_\_\_
- Date: \_\_\_\_\_ 192\_\_\_\_\_

NOTE: Certificate of Presiding Judge or Clerk of proper court showing qualifications of applicant pursuant to Rule 2 of this court (Rule 2 is reprinted in full below), must be attached to this statement. Motions for admission to practice to be presented in open court by a member of this bar. The applicant must be present in person. Fee for admission, \$15.

## RULE 2

### ATTORNEYS AND COUNSELLORS

1. It shall be requisite to the admission of attorneys or counsellors to practice in this court, that they shall have been such for three years past in the highest courts of the State, Territory, District, or Insular Possession to which they respectively belong, and that their private and professional characters shall appear to be good.

2. In advance of application for admission, each applicant shall file with the clerk (1) a certificate from the presiding judge or clerk of the proper court showing that he possesses the foregoing qualifications, and (2) his personal statement setting out the date and place of his birth, the names of his parents, his place of residence and office address, the courts of last resort to which he has been admitted, the places where he has been a practitioner, and, if he is not a native born citizen, the date and place of his naturalization.

3. Admissions will be granted only upon oral motion by a member of the bar in open court, and upon his assurance that he knows, or after reasonable inquiry believes, the applicant possesses the necessary

qualifications and has filed with the clerk the required certificate and statement.

4. Upon being admitted, each applicant shall take and subscribe the following oath or affirmation, viz.:

I, \_\_\_\_\_, do solemnly swear (or affirm) that I will demean myself, as an attorney and counsellor of this court, uprightly, and according to law; and that I will support the Constitution of the United States.

5. Where it is shown to the court that any member of its bar has been disbarred from practice in any State, he will be forthwith suspended from practice before this court, and unless, upon notice mailed to him at the address shown in the clerk's records and to the clerk of the highest court of the State to which he belongs, he shows good cause to the contrary within forty days he will be disbarred.

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#### FOOLING OURSELVES<sup>1</sup>

No experienced lawyer or judge really believes that our present criminal procedure is fifty per cent effective in deterring and punishing major crime in our nation. We merely fool ourselves into believing that our system of trial and punishment is efficiently functioning for the purpose intended.

I think the delay in the trial and punishment of the criminal accounts for eighty per cent of the ineffectiveness and failure of the present system. The subject is an old one, but even so it cannot be discussed too much at the present time when we see from the daily press the shocking amount of capital crime in America as compared with that in the European countries where certain and speedy justice is administered in criminal cases.

Well, I imagine I can hear the reader saying, what have you to suggest as a remedy and what are your views on this threadbare subject? I have no new ideas to advance on the question, except to point directly to a specific remedy; and I write this article in the hope of doing some good by arousing the practical thinkers to action looking toward a system of criminal procedure that will result in speedy criminal justice.

The Constitution of Mississippi, where I now reside, and that of Texas, where I spent the most impressionable part of my life, are

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<sup>1</sup>By Hon. John Burt Holden, Presiding Justice Division B, Supreme Court of Mississippi, Aug. 15, 1925.



similar in fundamental respects. In my address as President of the Mississippi State Bar Association in 1923, discussing the subject of speedy justice as a remedy against mob law, I said, in part:

I shall merely make the suggestion, and then leave it to the thoughtful consideration of the legal fraternity of our state, that the delay in the trial of capital cases can be avoided by amending our Constitution and passing laws to secure the result desired.

Without going into details, I will illustrate the idea I have in mind by pointing out that if the obstructive provisions of our Constitution were amended by providing that the accused shall have all the rights enumerated therein in all cases, with certain exceptions in "capital cases," then the legislature would be free to provide for a speedy trial and early execution of the convicted criminal after the crime is committed.

We know that murderers in England are tried and executed within a few weeks after the crime, the trial judge there having a large discretion. Some sections of our organic law would have to be changed, in order to permit the legislature to pass general laws expediting the trial and execution of sentence in capital cases.

It might become necessary to change our law so that criminal courts would be open for business at all times; that in such cases the charge may be preferred by information of the district attorney, and final trial had thereon; the appeal to the Supreme Court could be made to have right of way, required to be a preference case, and the judgment upon affirmance to be executed without delay. It is possible that such a scheme can be worked out whereby justice according to law will be rendered in such cases within a comparatively short time after the commission of the offense, and thereby satisfy those who would resort to mob law on account of the present delays in criminal procedure.

Incidentally the scheme would also decrease capital crimes, since the lawless would know that swift and certain punishment would be meted out to the guilty.

We all know that in those countries where justice is speedy and certain for the criminal, there is far less crime than in our country. The difference is startling. And yet we hear of no convictions of the innocent, and the procedure is so speedy and the punishment so certain that the lawless are really deterred from crime, which is the real purpose and intent of the law.

The people can easily change the organic law to bring about the desired results. Who is it that opposes such reform in our criminal procedure? The legal fraternity, the judges and many thinking laymen know where the opposition comes from.

The press of the country often criticizes the courts for so-called

technicalities and delayed justice. It could accomplish more, however, by exerting its power and influence to awaken the better class of citizens to serve as jurors, and by urging the legislative departments to repeal the many statutes which "shackle and fetter" the trial and appellate courts in criminal cases.

Having passed through all the "chairs," as defender of criminals, public prosecutor, and circuit and appellate judge, I can testify in good conscience that I feel sure I never had, in twenty years of criminal practice, an innocent client convicted, though I cannot say that all who escaped conviction were innocent. False convictions in capital cases are exceedingly rare—so much so as to be negligible. The Bar knows this.

Most of the delays in criminal prosecutions are unnecessary, but unavoidable under our present system. The announcement of a delay is "*music to the criminal's ear.*"

There are hardly any convictions and punishments of innocent persons. Most judges know that while the jury is the sole trier of fact and that its finding is generally not to be disturbed, yet the judge is ever watchful with "an invisible eye" to see that no innocent man is punished. He can prevent wrongful punishment but not wrongful acquittal. Then there is also the governor to commute or pardon.

Now summing up on the point desired to be made herein, I think the machinery for the administration of criminal justice in capital cases may be made to operate speedily and adequately, and bring about favorable results in deterring crime. To the accomplishment of this end I suggest that persons charged with the commission of capital crimes be speedily brought to trial, that change of venue be liberally allowed, that the trial record be prepared and presented immediately to the appellate court and that such court give precedence to such cases over all others and, if the judgment be affirmed, execution be set for the next Friday. If this were done fewer capital crimes would be committed and a greater respect for the law would be engendered.

*John Burt Holden.*

Jackson, Mississippi.

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#### HOW CONFIDENCE IN OUR COURTS CAN BE STRENGTHENED

The President of the Texas Bar Association, in a recent article entitled "The People's Business," said:

There is a general impression that government at this time is

failing in the accomplishment of its purposes. We hear it said that our legislatures—local, state, and national—fail to function properly; that they do many things that should not be done and leave undone many things that should be done. We also hear it said that the executive departments of our governments are weak, inefficient and often corrupt; and that the judiciary has broken down in the administration of justice, both civil and criminal. And, while these statements are not to be taken too literally, there is a large element of truth in them.

As far back as 1916 the chairman of the judiciary committee of the State Bar Association said in an article on Procedural Reform in Texas:

It might be intemperate to say that our procedural system has utterly broken down, but it is not too much to say that it is a burden under which justice groans and which more than anything else, stigmatizes the legal profession.

In the same year the late W. H. Kimbrough of the Amarillo bar, in an address on Reforms in the Texas Judiciary, said:

We should not close our eyes to the fact that there is a widespread discontent with the existing judiciary conditions and the current output of the courts. There is no denying the fact that there has been an alarming decadence in the judiciary of this country, in the quality of its work, in the dignity of its attitude, and in the respect and confidence of the public.

A large and apparently increasing number of persons are complaining of present-day tendencies in government. These complaints cover a range from charges of laziness on the part of the members of the judiciary to charges of corruption in other departments of government, both state and national. While right thinking people rarely give credence to general charges of this character, still the result of constant public complaining has been to create a feeling of unrest and to disturb public confidence in our official life.

It has become popular to charge the legal profession with being enslaved to precedents. It must be admitted that the charge is not entirely without foundation, but it would hardly be asserted that the main trouble lies here. There is much reason for the widespread criticism of court procedure, but it is doubtful if procedural defects constitute the basic reason for the present attitude of the people toward their courts. The imperfections of procedure tend to create a feeling of impatience with the law's delays, but are not sufficient to shake public confidence in the most trusted of our three departments of government.

The main cause of dissatisfaction with the judiciary is fundamental. It is based on a growing antipathy in certain quarters to that function of the judiciary under which it determines whether legislative enactments are constitutional. This prerogative (sometimes referred to as judicial supremacy) is peculiar to the American plan of government. The distribution of governmental powers among three independent departments is not conducive to sudden changes in our fundamental law, and the judiciary has proved the most effective barrier against hasty change. For this reason our courts are made the targets of political agitators, reformers and seekers of class legislation.

Mr. James Bryce, in an essay written when he was the British ambassador to this country, said:

In the new democracies of the United States . . . the multitude no longer fear abuse of power by its rulers. It feels no need for protection which rigid constitutions give. And in the United States it chafes under these restrictions of legislative power embodied in the Federal Constitution or State Constitutions (as the case may be) which have surrounded the rights of property and the obligation of subsisting contracts with safeguards obnoxious not only to the party called socialists, but to reformers of other type. As these safeguards are sometimes thought to prevent the application of needed remedies and to secure immunity for abuses which have become entrenched behind them, the aforesaid constitutional provisions have incurred criticism and censure from various sections, and many attempts have been made by state legislatures . . . to disregard or evade these restrictions. These attempts are usually defeated by the action of courts. When it happens, both the Federal Constitution and the function of the judiciary are often attacked in the country which was so extravagantly proud of both institutions a half century ago.

The attacks referred to by Mr. Bryce have subsequently become more numerous, and have received occasional sanction from some who enjoyed a large measure of the confidence of the people.

Mr. Roosevelt, in his campaign for the so-called New Nationalism, said:

We in America have peculiar need thus to make the acts of the courts subject to the people, because owing to causes which I need not now discuss, the courts have here grown to occupy a position unknown in any other country, a position of superiority over both the legislature and the executive. Just at this time, when we have begun in this country to move toward social and industrial betterment, and true industrial democracy, the attitude on the part



of the courts is of grave portent, because privilege has intrenched itself in many courts, just as it formerly intrenched itself in many legislative bodies and executive offices.

Utterances such as the foregoing, while directed primarily at the judiciary, or as Mr. Roosevelt claims, at certain of the courts, nevertheless strike at the very roots of American government, and tend to reduce it to the type of government prevalent in European countries, which is characterized by the finality of legislative enactments.

Some of our ablest jurists have taken note of the tendencies above discussed, and have gone to some pains to re-declare the functions of courts. Elihu Root, in an address published a few years ago, said:

A comparatively new condition confronts us in the apparently increased tendency among Americans toward impatience with the courts whenever judicial decisions do not agree with their wishes.

In the same connection, he said:

It is not the duty of our courts to be leaders in reform, or to espouse or enforce economic social theories, or, except in very narrow limits, to readjust our laws to new and social conditions. The judge is always confined within the narrow limits of reasonable interpretation. It is not his function, or within his power, to enlarge or improve or change the law. His duty is to maintain it, to enforce it, whether it be good or bad, wise or foolish. His duty is to interpret the law as it is in sincerity and truth, under the sanction of his oath, and in the spirit of justice.

There is no necessity with us for judicial legislation. Necessity arises from time to time to change or modify our fundamental law, but our constitutions, national and state, provide the methods for change. If sentiment for an income tax law is widespread enough, the constitution is so amended as to permit its valid enactment by the legislative department. California's legislature enacted a primary election law before it was lawful for it to do so. The law was later secured by constitutional amendment, but not until politically inclined lawyers had had an opportunity to elevate themselves to the bench on the issue that the law should have been enacted by the combined legislative efforts of the courts and legislature rather than by the process of amendment through the expressed will of the entire electorate. It was pointed out in the early history of our government that if an act of the legislature is held void, it is not because the judges have control over the legislature, but because the will of the people as expressed in their constitution is paramount to that of their representatives expressed in

legislative enactments, in case of conflict.

While the campaigns for such measures as the recall of judges and the recall of judicial decisions bore but little fruit directly, they gave impetus to the movement to break down the important distinction between statute law and constitutional law. The preservation of this distinction by an independent judiciary is the strongest guaranty of the people against the destruction of their personal and property rights. An orderly way is provided whereby the people, if they so desire, may surrender their rights—even their right of parental control—to the state or nation, but our courts would be recreant to their high duty if they should assist in taking away these rights before the people have surrendered them in the manner provided by our fundamental law.

An associate justice of the Supreme Court of the United States said of our courts:

They are the balance wheel in the division of powers. They possess neither the power of taxation nor that of the swords. They are dependent upon the legislative power for their existence, and upon the executive for the force needful to enforce their judgments. They are the arbiter between the other two departments. They are the guardians of our fundamental law. Their dominating authority is moral. They will continue to retain their authority so long as they respect their own limitations, scrupulous to avoid the exercise of powers which they do not have, fearless in the exercise of those they have.

The judiciary has suffered in consequence of the agitation directed against it. The result, primarily, is to give a political coloring to the courts, and to retire from judicial service some of our wise and courageous jurists. Frequently they are replaced with judges elected on the strength of popular political declarations.

The chief protection of the few as against the many, of the weak as against the strong, the main assurance of the perpetuity of our republican institutions, lies in a strong, capable and independent judiciary. Such a judiciary is its own best assurance against public distrust. It will not only command the confidence of right thinking people, but will enjoy their affectionate regard as well. The judicial department, if it is to enjoy the confidence of the people, must be dominated by men of wisdom, courage, and fairness, who understand, and are in sympathy with, the American plan of government; men of high legal attainments and a keen sense of justice; and above all, men of character and decision. As was said in the address referred to at the outset: "The whole problem is one of judges."

While the Texas judiciary has many judges of the type described, the way best calculated to increase the percentage of that type and thereby keep the judiciary both strong and independent, is to provide a more careful mode for the selection of judges of both the district and appellate courts. The present mode of nominating candidates by primary elections is not conducive to maintaining the highest standard of judicial service. The voters at the primaries would choose candidates for the judiciary possessing the requisite qualifications if they had the same opportunity to learn what their qualifications are that members of the bar and delegates representing the electorate have. When the country was sparsely settled the candidates for judgeship were better known to the voters than they now are. Since the growth of large cities information as to the men best equipped for judicial service is not within the reach of the voters.

The people should, therefore, provide for the selection of judges through their delegates chosen to represent them in judicial conventions. The conventions should not be held at times when the public servants other than judges are to be selected, when other matters of public concern overshadow. Such a plan it is believed will contribute toward securing a judiciary of the highest order. The convention system has its disadvantages, but it makes more rare the type of judge, who, like Pilate at the trial of the Savior, said to the multitude, "What will ye then that I should do?"

The convention system of selecting judges, together with provision made for a longer term of service, will induce an increased number of the most useful members of the bar to aspire to service on the bench. The judiciary will thereby gradually be made stronger and more independent. Thinking men know that the administration of justice is with us the cornerstone of our government, and that if our people lose faith in the triumph of justice under the law, they will have lost faith in our form of government.

There is little danger of ultraconservatism on the part of a judiciary selected in the manner suggested. It will recognize more readily than a popularly nominated judiciary, that a just mean should be preserved between reform and conservatism. By its recognition of custom as law, and by its free use of logic and analogy to develop law, it will preserve that even balance. To such a judiciary the people can look for peace and safety in the ordinary affairs of life and for protection of their property rights, and it is seldom they will look in vain.

Dallas.

*W. M. Taylor.*



## SIMPLICITY IN PROCEDURE

Are defects in procedure responsible to any material extent for miscarriages of justice? That question should be answered, in my judgment, in the negative and not the affirmative.

The statutes in this state regulating court procedure have been in force, practically in the same general form, for a number of years. They are models of clearness, succinctness and sufficiency.

All actions at law and suits in equity are to be commenced by petition in which the plaintiff is to make a statement of his cause of action and such other allegations pertinent to the cause as he may deem necessary to sustain his suit—the word suit covering actions at law as well as suits in equity—followed by a prayer for the relief sought. To this the defendant may plead as many several matters, whether of law or fact, as he shall deem necessary for his defense and which may be pertinent to the cause. He may also set up his counter claims, if any, in the same simple way. Where any pleading is to be made under oath the statutory requirements are equally simple.

The object of pleading is to apprise the court and the opposite party of the facts on which the pleader intends to rely, as constituting his cause of action or grounds of defense. And the averments should set forth the facts relied on with such precision, clearness and certainty, as to apprise the opposite party of what he will be called upon to answer, and what is intended to be proved, so that the evidence introduced may not take him by surprise. Such certainty is essential in order that the facts relied on by either party may be understood by the party who is to answer them; by the jury who are to ascertain their truth, and by the court who is to give judgment upon them. 2. Cowp. 682. Where there is not such certainty, objections to evidence ought to be sustained; for a party ought not to be permitted to prove what he has not averred. More especially is this true in reference to the pleadings under our system; where the technical general issues of the English system, adapted to their forms of action, each constituting the foundation for its own peculiar evidence and defense, are unknown. Under the general issues, as recognized in that system, matters of defense admissible in one form of action, may be inadmissible in a different form of action. But with us, neither the distinctions of the forms of action, nor the general issues exist; but our pleadings really are, or are intended to be, what the English pleadings are defined to be; the statement in a legal and logical manner of the facts which constitute the plaintiff's cause of action, or the defendant's ground of defense, or the written statement of those facts, intended to be relied upon as



the support or defense of the party in evidence.<sup>1</sup>

In order that the pleadings might be reduced to the simple forms prescribed by the statutes, each party is permitted to make amendments thereto and it is certainly within the power of the court trying a case to direct such amendments to defective pleadings, of its own motion, as it may deem necessary for a proper consideration and adjudication of the case before it.

Into these simple rules of pleadings there has been injected by the courts a mass of technicalities that confound the oldest practitioner, and the practicing lawyer of today dares not file any pleading without consulting a number of court decisions for the purpose of determining whether he has made a plain statement of his cause of action or defense. It is safe to say that in a very large percentage of cases the answer of the defendant to the plaintiff's petition is preceded by a general demurrer and a number of special exceptions, the latter going to the form and sufficiency of averments contained in the petition. Then will follow an amended petition with further demurrers and exceptions and possibly other amended petitions with other demurrers and exceptions thereto, until finally, when issue is joined, neither the plaintiff has a plain, concise statement of his cause of action, nor has the defendant such a statement of his grounds of defense. The pleadings in a case having thus been made intricate by court decisions, is it any wonder that our court reports are filled with decisions on procedure, the final adjudication of cases delayed, and the real justice of the cause submerged in a sea of technical rulings?

What has been the inevitable result of this conversion of simplicity into intricacy? Lawyers have become prolix in their pleadings in order to meet court decisions and that in turn has produced a new crop of demurrers and exceptions.

After the pleadings of the respective parties have passed through the fiery furnace of a trial court, and probably not emerged therefrom unscathed, they are taken up to an appellate court for another incineration and the ashes may finally reach the Supreme Court for distribution.

In the process of judicial decisions there is a continual progression of precedents, one growing into another, and the meaning of these precedents will come up for judicial determination from time to time and new difficulties will necessarily arise as to the construction of what

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<sup>1</sup>Mims v. Mitchell, 1 Tex. 446.

is the meaning of a plain statement as construed in the light of those precedents.

Is there any remedy for this situation? Certainly we can get nowhere by legislative enactments, for those we already have, and the remedy, if any, must be found in repeated judicial criticisms by the court of last resort in the state of voluminous pleadings, and by frequent and clear statements by it as to what constitutes the plain statement of the cause of action and the defense thereto required by the statutes. That court may in that way ultimately reduce pleadings to the simplicity provided for by those statutes. It is possible that some relief may be obtained by conferring upon the Supreme Court the authority to permit amendments of pleadings after a case has reached that court if, in the opinion of the court, the ends of justice in the case may be thereby attained.

This power to authorize amendments might be extended in other directions. In the trial court amendments of pleadings, of motions for new trial, and other papers filed, are liberally allowed. Is there any good reason why there should not be given to the Supreme Court when a case goes up on appeal, the authority to authorize amendments of assignments of error, amendments of briefs to properly present such assignments, and such other amendments as may be necessary to a final disposition of the case in such way that real justice may be arrived at? We hear much at the present time about substantial justice and the contention is frequently made that no case should be reversed upon any ground unless it be made to appear affirmatively that substantial justice had not been reached in the lower court because of errors assigned, but we hear nothing in regard to what is the duty and what should be the power of the Supreme Court to render a judgment doing substantial justice, where, from the whole record it appears that such justice has not been decreed in the lower courts. In suggesting the conferment of authority to allow an amendment of pleadings on the Supreme Court, and not on the Courts of Civil Appeals, I do not intend any criticism of the latter courts, but we have a number of them in this state and there may be differences between them that will have to be finally determined by the Supreme Court and the latter court by its advance decisions in cases before it may avoid those differences by a clear expression of the court's views, whether they be necessary or not to the proper disposition of the particular case.

The case being at issue the trial procedure is simple: testimony pertinent to the issue, or issues, involved, and having sufficient probative force to constitute competent evidence, may be introduced by the

respective parties, and when all of the evidence is in, if the trial is before the court, it passes thereon and renders its judgment; if there is a jury trial, the court, if requested, must give the law of the case to the jury, without comment on the facts, and upon the verdict that may be found, enter its judgment; if errors have been committed by either court or jury in the course of the trial, the court may grant a new trial.

I premit any consideration of the frequent failures of justice in trial courts under that procedure for to enter into such discussion would unduly lengthen this paper, and pass on to the statutes providing for appeals from those courts. Here again we have simplicity. A statement of the testimony in narrative form is made up; a transcript of the record in the case prepared and the two filed in the proper Court of Civil Appeals, an appeal bond having first been executed and filed by the party appealing. In this record there must be an assignment of the errors complained of as grounds for the reversal of the judgment.

The requirements of the statutes with reference to assignments of errors are as follows:<sup>2</sup> "The appellant or plaintiff in error shall in all cases file with the clerk of the court below all assignments of errors, distinctly specifying the grounds on which he relies. . . . All errors not distinctly specified are waived. But an assignment shall be sufficient which directs the attention of the court to the error complained of." It will be noted that the statute merely requires the error complained of to be distinctly stated, and when that is done it is complied with, but again the courts have read into it by construction, indefiniteness as to what is meant by "distinctly specifying the ground of error." As long as we had but one appellate court to which appeals could be taken, the Supreme Court, there was but little complaint of court construction of the statutes. After the establishment of the Courts of Civil Appeals, however, the constructions necessarily became more numerous and the only relief from an erroneous one lay in an application to the Supreme Court for a writ of error, or in the certification of questions to that court by the Courts of Civil Appeals. In some cases the writ was allowed upon other grounds than that of misconstruction and the case disposed of without reference thereto and the construction remained as a precedent, at least in the court making it. A general uncertainty then arose among the bar of the state as to the meaning of the statute and to avoid the danger of an adverse court construction, assignments became voluminous and sometimes

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<sup>2</sup>Art. 1844, R. S. 1925.

argumentative, and were in turn attacked upon the ground that they did not distinctly specify the grounds of the error complained of, and, of course, more court constructions necessarily followed with resultant applications for writs of error to the Supreme Court. The difficulty suggested, however, may be obviated by authorizing both the Supreme Court and the Courts of Civil Appeals to permit in those courts amendments of assignments held defective by them, charging the cost thereof to the party at fault.

When the case reaches the Court of Civil Appeals, the appellant, at least, should file a brief. The rules for briefing are made by the Supreme Court and are not statutory. For a number of years before the creation of the Courts of Civil Appeals there was no particular form required for a brief. When the docket of the Supreme Court, however, became crowded and it was important that it should be assisted in the disposition thereof by briefs conforming to rules to be established by that court, such rules were adopted and certain requirements prescribed for a brief to be filed thereunder. The construction of these rules injected new questions into the disposition of the cases on appeal, and with the creation of the Courts of Civil Appeals these questions necessarily increased in number as each court could give its own construction to the sufficiency of each brief before it, and if this construction was erroneous the only relief lay in a review of the question by the Supreme Court through writ of error or certificate. The rules first adopted by the Supreme Court were somewhat involved and were generally construed as requiring a separate submission of every error relied upon for reversal, following same with a proposition or propositions, a statement from the record and, at the option of the person briefing, an argument thereunder. Briefs, therefore, under those rules, became very voluminous, and as they had to be printed if they covered more than a certain number of pages, the cost became a heavy charge upon litigants. Recently, however, the Supreme Court has adopted a new set of rules based largely upon the briefing rules of the Supreme Court of the United States, intended to obviate some of the difficulties suggested above. These rules are models of simplicity, but they must run the gamut of judicial construction, and how they will emerge therefrom cannot now be known.

Their substantial requirements are that the appellant shall present to the appellate court the respective points or propositions upon which he relies for a reversal of the case and shall refer under each point to the assignment or assignments of error upon which he bases his points or propositions. It may happen, and does happen, that an error com-



plained of appears in various forms in the trial of a case. It may arise on exceptions to pleading, on objections to testimony, on the charge of the court, on special charges refused, on the verdict of the jury and on the judgment of the court on the verdict. The legal proposition or point applicable to all of these errors need be stated but once to call to the judicial mind the very question that is involved in the case and reference to the various errors assigned upon which the point is made will show to the appellate court that the error has been properly complained of in the trial court and should be considered by the appellate court under the point or proposition presented.

There are, of course, some changes in procedure that may serve to further simplify it, but a discussion of them is foreign to this paper. Back of the whole question of the proper administration of the law there necessarily lies the personal equation. We must have a trained judiciary, both *nisi prius* and appellate, and we must have a trained and intelligent bar, with a high moral standard that will conscientiously and intelligently aid the judiciary. The trial of the case must be something more than a conflict of wits between attorneys engaged therein; it must be a fair and conscientious effort on the part, not only of the court hearing the case, but on the part of the lawyers trying the case, to reach the ends of justice therein. Attorneys may conscientiously differ as to what is the real justice of the case, those upon the one side asking for one determination by the court and those upon the other side asking another determination, but each should present their respective contentions with absolute fairness to the trial court without concealment of facts, so that the decision of the court may be intelligently made and without bias or prejudice. Upon the lawyers themselves largely lies the responsibility for the due and proper administration of the law, for it is they who must live up to the standard required of ministers of justice and it is from their ranks that judges are selected. The courts, however, must cordially respond to the work of the bar, for if they do not, lawyers may feel justified in endeavoring to protect the rights of clients, by resorting to the use of every available technicality, and the due and orderly administration of the law will be impeded and the courtrooms will lose their sanctity. It must be ever borne in mind also, that lawyers cannot successfully serve as ministers to the courts if their voice in the selection of judges is silenced by popular clamor.

*Thos. H. Franklin.*

San Antonio.

# TEXAS LAW REVIEW

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THE SCHOOL OF LAW.—THE REVIEW is pleased to announce the following appointments to the Faculty of the School of Law: Robert Weldon Stayton, A. B., Professor of Law; John Edward Hallen, A. B., LL. B., Professor of Law; George Wilfred Stumberg, A. B., LL. B., J. D., Professor of Law; A. W. Walker, Jr., A. B. LL. B., Associate Professor of Law; Frank Brittin Clayton, LL. B., Instructor in Law.

Judge Stayton graduated from the University of Texas in 1907. He studied in the School of Law two years and engaged in active practice in Corpus Christi, Texas. He was a member of the Board of Legal Examiners from 1921 to 1923. In 1923 he was appointed Judge of the Commission of Appeals, which position he held until June, 1925. He served as President of the Texas Bar Association in 1924-1925. He is the author of a Texas Form Book. Judge Stayton will give the courses in Administrative Law, Criminal Law, Conveyances and Office Practice, Municipal Corporations, and Wills.

Professor Hallen graduated from Yale University in 1916 and from Yale Law School in 1918. He was Editor in Chief of the *Yale Law Journal* during his senior year. He practiced law three years in New

York City and in Connecticut, and taught law in the University of Kansas Law School four years. He taught in the University of Texas Summer Law Schools in 1923 and 1924. Professor Hallen will give the courses in Bills and Notes, Equity and Quasi Contracts, Trusts, and Insurance.

Professor Stumberg graduated from the University of Louisiana in 1909 and from Columbia University Law School in 1912. He practiced law one year in Missouri, was appointed Rhodes Scholar from Louisiana, and studied the civil law and the English common law at Oxford. After spending two years at Oxford, he joined the American Embassy in Paris, France, where he remained until he resigned to enter the American Army in 1918. He taught in the University of Louisiana Law School from 1919 until 1923, when he spent one year in Yale Law School, receiving the J. D. degree with honors. Professor Stumberg will give the courses in Constitutional Law, International Law, and Conflict of Laws.

Professor Walker graduated from the University of Texas in 1919 and the School of Law in 1922. During his senior year he was Student Editor in Chief of the TEXAS LAW REVIEW. He practiced law in Dallas, Texas, two years. Professor Walker will give the courses in Carriers, Partnerships, Persons, Suretyship and Mortgages, and one section of Conveyances and Office Practice.

Mr. Clayton graduated from the University of Texas School of Law in June, 1925. He received the Bachelor of Laws degree with highest honors, and served as Student Editor in Chief of the REVIEW during his senior year. Mr. Clayton will give the courses in Agency and Sales.

The School of Law began the year of 1925-26 with a registration of 296, with an additional 12 registered in other departments who are taking two or more law courses. The registration for the corresponding date last year was 354. The decrease in the entering class was due to the raising of the standards for admission by specifying the ten college courses required. Twenty-five applicants, who could have entered conditioned, were induced to spend one more year in the academic department. Of the first year class of 93, 9 are special students, not candidates for degrees; 22 have received their A. B. degrees, and 12 will receive their A. B. degrees at the same time they receive their LL. B. degrees. The third year class consists of 66 candidates for degrees in June, 1926, 30 in August, and 3 special students.

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THE TEXAS LAW REVIEW wishes to express its appreciation of the services rendered by Professor Charles S. Potts, Chairman of its Board of Editors for the past three years. Mr. Potts, who is now doing graduate work at Harvard, was the first Editor of this REVIEW. Whatever success it may have attained is due in large measure to his untiring efforts. The launching of a Law Review is beset with difficulties and overwhelmed with details. He participated in the plans for its organization, in the partitioning of its fields of endeavor, in the establishment

of its standards. In arranging the style, the make-up, the typographical nature of this magazine, his contribution was large. For the securing and revising of material, with the long hours of patient solicitation, correspondence, selection and proofreading, credit is due almost entirely to him. His literary taste, sane judgment and pleasing personality made him invaluable. In addition to recognition accorded by Editors and Directors of this REVIEW, Mr. Potts was given a vote of thanks and appreciation by the Texas Bar Association at its last convention.

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THE TEXAS LAW REVIEW extends its good wishes to the Law School of Southern Methodist University, which has opened for its initial year this fall at Dallas, Texas. The faculty consists of Judge J. E. Cockrell, as Acting Dean; Mr. W. A. Rhea, formerly of the faculty of the Law School of the University of Texas, as professor of law, and Mr. R. B. Holland, LL. B., 1925 (University of Texas), formerly one of the Student Editors of this REVIEW, as assistant professor of law. The presence of these gentlemen on its faculty and the high character of the university of which it forms a part, augur well for the success of the new school, and for its adherence to high standards of legal instruction.

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SOME OBSERVATIONS ON *ARNOLD V. LEONARD*, 273 S. W. 800.—This case decides that what shall constitute the separate property of the wife is irrevocably fixed by the constitution, and the legislature has no power to make any other property acquired during marriage her separate property. This conclusion is thought to be undoubtedly correct.

This case, however, goes farther and holds that the provisions of the Act of 1913 and similar provisions in the Acts of 1917 and 1921 referred to in the opinion, which are to the effect that "neither the rent from the wife's separate real estate, nor the interest on bonds and notes belonging to her, nor dividends on stocks owned by her, nor her personal earnings shall be subject to the payment of debts contracted by the husband" are valid, and that although the income derived from the sources above enumerated is in fact community, that it cannot be legally appropriated to the payment of any debt contracted by the husband.

It will be noted that the holding exempts from the payment of community debts if contracted by the husband, all community property received as rentals from the wife's separate lands, as interest on her bonds and notes, as dividends on her stocks and as compensation for her personal services. All such sums, however, still remain community property. Under the law of this state community property "is not liable for debts or damages resulting from contracts of the wife except for necessities furnished herself and children unless the husband joins in the execution of the contract."



The result of the foregoing is that we have a species of community property that is not even liable for necessities furnished the family if the debt is contracted by the husband, and that can be made liable for no community debt other than for necessities contracted for by the wife. This property is not liable for the husband's separate debts nor for the wife's separate debts, so that excepting necessities contracted for by the wife there are no debts for which this class of property is liable unless it be a debt contracted jointly by the husband and wife.

It seems probable, however, that the courts will hold that this particular species of community is not liable even for the community debts contracted by the husband and wife jointly, as the act does not attempt to enlarge the rights of the wife to contract community debts, but only to relieve certain community property from the payment of debts contracted by the husband.

If the Constitution finally and clearly defines what shall constitute the separate property of the wife, then it necessarily follows that all property which does not come within the definition given must be community property. If the legislature has not the power to declare that community property shall be separate, or vice versa, has it the power, by restricting the control and liabilities of such property, to in effect accomplish the same purpose?

If the legislature had gone further and declared that this community property should not be liable for any community debt, would the legislation have been held valid?

If so, then the property for all practical purposes excepting inheritance becomes the separate property of the wife.

This particular species of community would be even more valuable to the wife than if it was her separate property for the reason that it would not be subject to debts contracted by her for the benefit of her separate estate.

Property consists, not in the possession of the thing but in the right to the use of it, and it seems inadmissible to declare certain property community, and at the same time hold that it cannot be applied to the payment of community obligations contracted in such manner as the law declares shall bind the community. Are we to have two classes of community, one liable for community debts, and the other not?

The foregoing observations are submitted and seem to the writer to deserve some consideration by the court or by the next legislature.

It has been suggested that REVISED STATUTES, 1925, Article 4623, may cast doubt upon the foregoing conclusion as to the exemption of the personal earnings of the wife and the income, rents, and revenues of her separate property from any debts except for necessities contracted for by the wife. That article provides that "neither the separate property of the husband nor the community property other than the personal earnings of the wife, and the income, rents, and revenues from her separate property, shall be subject to the payment of debts contracted by the wife except those contracted for necessities furnished

her or her children." The suggestion, in other words, is that the above quoted statute had the effect to enlarge the powers of the wife to contract debts, and as a consequence to make the income, rents, and revenues from her separate property subject to the payment of such debts.

But the article referred to had, it is thought, no such effect. Before the adoption of the amendment in 1913, the wife had no power to contract debts binding upon the community property except for necessities for herself and children. The Act of 1913 as originally introduced in the legislature provided:

The wife may make any contract which she would be authorized to make but for her marriage except those herein or elsewhere forbidden and her coverture shall never be a defense in any suit or action based on such contract, but suits may be brought thereon in the manner prescribed by Articles 1840 and 1841.

The foregoing was followed in the original bill as introduced by the provisions now contained in REVISED STATUTES, 1925, Article 4623. This article does not undertake by express words to enlarge the power of the wife to contract debts.

The decision rendered by Judge Phillips in the case of *Red River National Bank v. Ferguson*, 109 Tex. 287, 206 S. W. 923, is decisive of the question suggested, although the facts of the case are not identical.

In this connection it is well to note that the original bill which was passed by the legislature in 1913 contained the provision above quoted enlarging the rights of the wife. The bill containing the provision enlarging the power of the wife to contract debts was passed and received by the governor but was recalled before he acted on the bill. He objected to the provision conferring the additional power on the wife to contract as a feme sole and upon a reconsideration this provision was stricken from the bill. This history is recited in the case of *Red River National Bank v. Ferguson*.

In the light of these facts it is concluded that the proviso contained in Article 4623 cannot be held to confer the power upon the wife to contract any debts other than those which are provided for in the other part of the act as finally adopted.

J. T. Montgomery.

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STATE SUPERVISION OF EDUCATION AND THE FOURTEENTH AMENDMENT.—The present tendency, in some of the states at least, towards standardization of education through legislative supervision, received a check in *Pierce v. Society of the Holy Names of Jesus and Mary*, *Same v. Hill Military Academy*,<sup>1</sup> in which the Supreme Court of the United States held invalid the Oregon Compulsory Education Act. This act, which was adopted in 1922 under the initiative provisions of the

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<sup>1</sup>69 L. Ed. 688, 45 Sup. Ct. 571 (June 1, 1925). Independent suits were brought by the plaintiffs. On appeal the cases were combined.

Oregon Constitution, required parents or guardians or other persons having custody of a child between the ages of 8 and 16 years to send him "to a public school for the period of time a public school shall be held during the current year" in the district of his residence. The plaintiffs, corporations organized under the laws of Oregon and engaged in instructing children within the ages named in the statute, sought an injunction in a federal district court to restrain the governor of the state and others from threatening to enforce the statute. In affirming the decision of the lower court granting the injunction, the Supreme Court held the act unconstitutional on the ground that it unreasonably interfered with the liberty of parents and guardians to direct the upbringing and education of children under their control and therefore conflicted with the Fourteenth Amendment to the Constitution of the United States. In answer to a contention that the plaintiffs as corporations could not claim for themselves the liberty which the Fourteenth Amendment guarantees, it was stated that plaintiff's business and property were threatened with destruction through the compulsion which the state was about to exercise over present and prospective patrons of their schools and for this reason the statute constituted a taking of property without due process of law.

The result reached was to be expected in view of the decision of the same court in an earlier case in which the Nebraska foreign language statute was held invalid. During or shortly after the World War a number of states through their legislatures forbade the teaching of any modern language to children before they passed the eighth grade. In *Meyer v. Nebraska*,<sup>2</sup> a teacher, who had been convicted of violating the Nebraska statute after the act had been upheld by the state courts appealed to the Supreme Court of the United States which declared it to be invalid on the ground that it deprived the appellant of his liberty to exercise his calling, that of modern language teacher, without due process of law. The court further incorporated in its concept of liberty the privilege of parents to engage the appellant to instruct their children. While it was admitted that a state could compel attendance by children at some school or make reasonable regulations for all schools, including compulsory instruction in English, and thus interfere with the liberty of the individual,<sup>3</sup> it was stated that the statute in question constituted an unreasonable interference and for that reason was not a justifiable exercise of the police power.

Naturally the results reached in these cases should be gratifying to those who disapprove of state interference with education. On the

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<sup>2</sup>262 U. S. 390, 67 L. Ed. 1042, 43 Sup. Ct. 625, 29 A. L. R. 1146 (1923). Mr. Justice Holmes and Mr. Justice Sutherland dissented. In *Bartels v. Iowa*, 262 U. S. 404, 67 L. Ed. 1047, 43 Sup. Ct. 404 (1923), a similar result was reached with reference to similar legislation in Iowa and Ohio.

<sup>3</sup>The question of the power of a state to prescribe a curriculum for institutions which it supports was expressly excluded from the scope of the decision.



other hand, it is doubtful whether sound legal results can be reached by attempting to settle the ever growing conflicts between the desires of an apparent majority in a state, expressed in legislation, and those of the individual, through the use of concepts, supposed to be fundamental, as was done in the two cases now under discussion. In the *Meyer Case*<sup>4</sup> reference was made to "fundamental rights which must be respected." In the *Pierce Case*,<sup>5</sup> Mr. Justice Reynolds, who delivered the opinion for the court, said, "The fundamental theory of liberty upon which all governments in this union repose excludes any general power of the states to standardize its children by forcing them to accept instruction from public teachers only." Statements such as these do not constitute tools for the decision of cases but in reality state results by assuming as true the very questions in controversy. In both cases the real controversy arose over the power of the state to impair an alleged privilege. If there was no privilege the statutes would be valid. If there was a privilege they would be invalid. Stating that the existence of the privilege is fundamental merely states the result, doing away with any necessity of considering the validity of the objective in view and the reasonableness of the means of reaching that objective through the enactment of the legislation under consideration. In other words, setting up a fundamental concept of liberty applicable in the particular case of necessity precludes inquiry into the desires of the collective majority and a resulting balancing of those desires against those of the individual. All legislation interferes with individual freedom. Carried to an extreme, fundamental concepts of liberty gathered from the common law theories of government, in vogue in the past, would make desired legislation looking to change impossible.

Such terms as "liberty," "property," and "due process" cannot be exactly defined. Likewise the boundary of the legitimate exercise of the police power by the state is not easy to mark. Necessarily decisions of controversies in which the power of the states to enact legislation under the Fourteenth Amendment is questioned, reflect largely a point of view or particular legal philosophy. In earlier decisions the "liberty" of the Fourteenth Amendment received an individualistic interpretation in connection with liberty to contract. In *Allgeyer v. Louisiana*<sup>6</sup> the term was declared to embrace the privilege of the citizen "to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation." Necessarily if progress was to be made to meet new conditions a seventeenth and eighteenth century conception of liberty could not be used as a test for the validity of nineteenth and twentieth century legislation. As a result, in order to meet these new conditions the interpretation in some cases became more liberal, showing a tendency to a replacement of a philosophy of individualism by a philosophy of collectivism. Examples

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<sup>4</sup>Cit. Note 2.

<sup>5</sup>Cit. Note 1.

<sup>6</sup>165 U. S. 578, 41 L. Ed. 832, 17 Sup. Ct. 427 (1897).



of such liberal interpretation are numerous and only a few need be given. To protect the health of a community vaccination may be required even though its efficacy as a preventive of smallpox may be debatable.<sup>7</sup> For the safety of the community a state may compel railroads to employ safety devices at crossings.<sup>8</sup> Again, the power of the state to protect public morals has been admitted in upholding drastic liquor laws prior to the Eighteenth Amendment.<sup>9</sup> Likewise, on the same ground a statute forbidding the operation of freight trains on any railroad in the state on Sunday was held valid,<sup>10</sup> and in *Chicago, Burlington & Quincy Railroad Company v. McGuire*,<sup>11</sup> the Supreme Court definitely recognized "public welfare" as a legitimate subject for legislative protection and the privilege of the individual to contract was declared to be subject to the authority of the state in all except unreasonable and arbitrary action.

The rule of this last case commends itself as one of sound policy as it leaves largely to the states the power of determining for themselves the policy they will adopt in enacting new legislation. While it admits the power of the courts to pass judicially upon the validity of such legislation it calls for the exercise of that power in exceptional cases only. The process of decision in the cases now under discussion makes the decision of every case dependent upon the individual views of policy entertained by the members of the court through the creation of concepts which fail to take into consideration the validity of the desires of the majority and are based entirely on general principles, supposed to be fundamental but which often only exist in the minds of the judges rendering the decision. In the Nebraska foreign language decision mention was made of the object to be attained, i. e., civic development through the use of a common language, but no consideration was given the fact that state legislatures in a number of states and the courts in several had thought the means reasonably adapted to bring about this result.<sup>12</sup> In the compulsory education decision no

<sup>7</sup>*Jacobson v. Massachusetts*, 197 U. S. 11, 49 L. Ed. 643, 25 Sup. Ct. 358, 3 Ann. Cas. 765 (1905).

<sup>8</sup>*Chicago B. & O. R. R. Co. v. Chicago*, 166 U. S. 226, 41 L. Ed. 979, 17 Sup. Ct. 581 (1897).

<sup>9</sup>*Mugler v. Kansas*, 123 U. S. 623, 31 L. Ed. 205, 8 Sup. Ct. 273 (1887).

<sup>10</sup>*Hennington v. Georgia*, 163 U. S. 299, 41 L. Ed. 166, 16 Sup. Ct. 1086 (1896).

<sup>11</sup>219 U. S. 549, 55 L. Ed. 328, 31 Sup. Ct. 259 (1911).

In this decision Mr. Justice Hughes said: "It (liberty of contract) is subject, also, in the field of state action, to the essential authority of government to maintain peace and security, and to enact laws for the promotion of the health, safety, morals and *welfare* of those subject to its jurisdiction." He also stated that "the principle . . . is that where the legislative action is *arbitrary* and has no reasonable relation to a purpose, which it is competent of government to effect, the legislature transcends the limits of its power in interfering with liberty of contract; but where there is reasonable relation to an object within the governmental authority, the exercise of legislative discretion is not subject to judicial review."

<sup>12</sup>Some nine states adopted similar legislation. In three of these, Nebraska,

mention was made of the object in view. This naturally follows from the use of "fundamental" concepts, as their use precludes inquiry into either the validity of the objective or the means employed to attain that objective. Perhaps the same result could have been reached in the *Oregon Case* by balancing the desires of the individual, not in Oregon alone, but in the nation as a whole, with those of the collective majority who voted for the Compulsory Education Act. Such a method of decision would have left the way clear to adopt a liberal attitude towards social and industrial legislative reforms. As it is, some reforms have been held invalid at the outset because they invaded privileges which the court without an attempt at justification or explanation found to be "fundamental."<sup>13</sup>

George W. Stumberg.

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IS FAILURE OF TRIAL JUDGE TO FILE FINDINGS OF FACT AND CONCLUSIONS OF LAW, WHEN REQUESTED, REVERSIBLE ERROR?—Perhaps no point in procedure has been more frequently before our appellate courts than some phase of the above question. A proper division of the question will simplify it, both for the purpose of examining the cases, and for the purpose of stating the conclusions reached.

1. *Is mere failure of the trial judge to comply with the statutes<sup>1</sup> reversible error?*

In *Wandry v. Williams*,<sup>2</sup> Chief Justice Gaines had presented to him on certificate from the Court of Civil Appeals three operative facts: (1) appellant seasonably requested the trial judge to file findings of fact and conclusions of law; (2) the trial judge failed to file such findings within the statutory period, and (3) there was no statement of facts in the record. The question was asked, "Is there reversible error?" The court found there was. The opinion does not state the issues involved, nor does it indicate whether the court could or could not give a correct and just decision of the case on the information before the court. While three operative facts were before the court, the absence of a statement of facts from the record was given no consideration, the opinion being based *solely* on the fact that the trial judge had not complied with the statute. The learned justice concludes:

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Iowa, and Ohio, the courts upheld the legislation. In the Supreme Court of the United States two judges dissented. See note 2. The decision of the majority amounts to holding that the action of the nine state legislatures, of the courts of three states and two justices of the Supreme Court of the United States is unreasonable.

<sup>13</sup>See *Adkins v. Children's Hospital*, 261 U. S. 525, 67 L. Ed. 785, 43 Sup. Ct. 39 (1923), holding invalid an act of Congress authorizing a board in the District of Columbia to fix minimum wages for women. Cf. *Lochner v. New York*, 198 U. S. 45, 49 L. Ed. 937, 25 Sup. Ct. 539 (1905).

<sup>1</sup>REV. CIV. ST. 1920, Art. 2075 (REV. CIV. ST. 1925, Art. 2247). REV. CIV. ST. 1920, Art. 1989 (REV. CIV. ST. 1925, Art. 2208).

<sup>2</sup>103 Tex. 91, 124 S. W. 85 (1910).

We conclude that the action of the trial judge in failing and refusing to file his conclusions of fact and law is subject to review by the Court of Civil Appeals, and where it is found that he has not done so, the judgment ought to be reversed.

Many opinions have since quoted and relied on this decision. To what extent the opinion has been followed is not altogether certain. In *Calveston, H. & S. A. Ry. Co. v. Stewart & Threadgill*,<sup>3</sup> Mr. Justice Hamilton reviews Chief Justice Gaines' opinion in this language:

The opinion is a clear-cut holding that where it is found that the trial judge, after proper and seasonable request, fails and refuses to file findings of fact and conclusions of law, and where no statement of facts is filed, the judgment ought, on proper exceptions to and assignment of such action, to be reversed. In fact the court does not predicate its holding upon the fact that no statement of facts appears in the record, but puts the decision solely upon the failure of the judge to file his findings and conclusions.

But since the certificate says no statement of facts was in the record and merely asks, 'Is there reversible error?' we are justified in interpreting the holding as going no further than to such cases as those in which no statement of facts appear.

The Courts of Civil Appeals have uniformly interpreted the holding in the *Wandry Case*, *supra*, as requiring a reversal of the case where no statement of facts appear in the record and have followed this construction of the holding in that case in their opinions with singular unanimity.

It is doubtful whether the courts have been *unanimous* in so interpreting the Gaines' opinion or the statutes.<sup>4</sup> In *Osborne v. Ayers*,<sup>5</sup> the court did not consider whether there was a statement of facts in the record and the report of the case does not show whether a statement was filed, nor did the court discuss whether a statement of facts or a finding of facts was necessary for a proper determination of the issues before the court. The decision is based squarely on the ground that the trial judge had failed to file his findings and conclusions as required by statute. Speaking through Head, J., the court said:

We are not prepared to hold that appellant's statutory right to have these conclusions filed could be made subservient to the disposition of the other business of the court.

In *Wood v. Smith*<sup>6</sup> the court failed to file findings and conclusions. There was a statement of facts in the record prepared by the court

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<sup>3</sup>257 S. W. 526 (Tex. Comm. of App., 1924).

<sup>4</sup>Note 1, *supra*.

<sup>5</sup>32 S. W. 73 (Tex. Civ. App., 1895).

<sup>6</sup>141 S. W. 795 (Tex. Civ. App., 1911).

upon the attorneys having failed to agree, which the appellate court describes as "exceedingly brief and meager." There was some question in the mind of the court whether, even if findings had been filed, the particular assignments and propositions presented would have been sufficient to raise the question which appellant sought to have decided. Before passing on that point, the court reviewed the cases. After a careful consideration of *Wandry v. Williams*<sup>7</sup> the court says:

We incline, therefore, to the opinion that appellant's first assignment is well taken, and that it was reversible error to fail to file conclusions of law and fact in this case, independent of whether there is a statement of facts in the record or not. But if we were to consider as affecting this question the other conditions present in this record, we should still make the same holding.

While seeming to think this a sufficient ground upon which to base its decision, the court finally concludes as follows:

We prefer, however, to put our decision on the fact that it appears that appellant pleaded a defense which, if proven, might have constituted a valid defense to the suit—that he had been deprived of conclusions of fact and law through no fault of his own, and that the resultant statement of facts omits some matters which we know might have been contained in it. To illustrate, it might have given the full recitals in the deed of trust.

In *Kyle v. Blanchette*<sup>8</sup> the court failed to file findings and conclusions. There was a statement of facts in the record agreed to by appellant. The evidence in the case was conflicting. Speaking through Reese, J., the court said:

There is a statement of facts in the record, but for which a reversal of the judgment would follow as a matter of course.

The court then reviewed cases which hold that a reversal would not be given where there is a satisfactory statement of facts in the record,<sup>9</sup> but on consideration of *Wandry v. Williams*,<sup>10</sup> the court concludes:

Notwithstanding there is in the record a statement of facts agreed to by counsel for appellant, we do not think the case presented is such that we can say that appellant is not prejudiced by the failure of the trial court to file the conclusions as required by law. There is a clear conflict in the evidence from which the court might have arrived at either one or two or three different conclusions as to the proximate cause of the accident. We dislike to reverse the judgment on this ground but appellant's plain statutory right has been denied without excuse, in such a way as to prevent the

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<sup>7</sup>Note 2, *supra*.

<sup>8</sup>158 S. W. 796 (Tex. Civ. App., 1913).

<sup>9</sup>*Bank v. Stout*, 61 Tex. 567, 571 (1884); *Jacobs v. Nussbaum*, 133 S. W. 484 (Tex. Civ. App., 1911); *Sutherland v. Kirkland*, 134 S. W. 851 (Tex. Civ. App., 1911).

<sup>10</sup>Note 2, *supra*.



proper presentation of his case in this court, within the terms of Rule 62a.

In *Guadalupe County v. Poth*,<sup>11</sup> the trial court failed to file findings and conclusions. He did send up a statement of facts which had been consented to by appellant. It is noticeable that the appellate court did not determine whether the issues before the court could be correctly decided from the fact presented, without possible prejudice to the rights of either party, but it sensed trickery, used to deprive appellant of his statutory right, and reversed.

The more recent cases do not consider mere failure of the trial judge to comply with the statute as a ground for reversal. The absence of any consideration being given to this question leads to the conclusion that no court would, at this time, reverse on that ground alone. In each of the earlier cases reviewed, the court had before it some additional facts besides mere failure on the part of the trial judge to comply with the statute. Consequently, none of the reviewed cases could be cited as an open and shut case in which the court *held* that the mere failure of the trial judge to comply with the statute was reversible error. It is clear, however, that the courts entertained some idea that such a failure was reversible error, and it is entirely probable that reversal would have been given on that ground alone, especially in *Wood v. Smith*,<sup>12</sup> had not a more satisfactory ground been found. The explanation seems to be that when the statutes<sup>13</sup> under consideration were passed, they were thought to be mandatory. But, obviously, it would be harsh to reverse a case merely for failure on the part of the trial judge to comply with the statute if it affirmatively appeared from the record that no injury had, nor could possibly have, resulted. Hence, the courts sought, and in so far as this investigation has revealed, found some other ground upon which to base their decision of reversal. Other changes in the interpretation and application of the statutes have likewise been made. It now seems to be settled beyond all question that findings and conclusions filed after the statutory period of ten days cannot be considered for any purpose,<sup>14</sup> while there is dictum in earlier cases to the effect that such findings could be considered, when filed after the statutory period, if the delay was for good cause.<sup>15</sup>

2. *Will the court reverse where there is a statement of facts in the record?*

At one time it seems to have been accepted that a failure on the part of the trial judge to file findings of fact and conclusions of law, when requested, was reversible error *unless a statement of facts appeared in*

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<sup>11</sup>153 S. W. 919 (Tex. Civ. App., 1913).

<sup>12</sup>Note 6, *supra*.

<sup>13</sup>Note 1, *supra*.

<sup>14</sup>*Patton v. Texas & Pacific Coal & Ice Co.*, 225 S. W. 857 (Tex. Civ. App., 1920); *Childress v. Wolf*, 273 S. W. 274 (Tex. Civ. App., 1925).

<sup>15</sup>*Osborne v. Ayers*, note 5, *supra*; *Sutherland v. Kirkland*, note 9, *supra*.

the record.<sup>16</sup> Such a saving clause was inserted, no doubt, because it was believed that a statement of facts would serve the same purpose as findings and conclusions—namely, save appellant from any possible harm. Such a case is *Owen v. Smith*.<sup>17</sup> There a request was made for findings and conclusions. The court made the findings within the statutory period, but failed to file them during such period. An agreed statement of facts approved by the court was filed, and the contention of the appellee was that the failure to file findings and conclusions in time was harmless. There was a clear conflict in the evidence on more than one material issue. Because of that conflict the court reversed, admitting that “the cases involving the question presented are not altogether harmonious.”

In *Wood v. Smith*,<sup>18</sup> there was a statement of facts in the record prepared by the trial judge which the appellate court described as “exceedingly brief and meager.” The decision does not point out any conflict in the evidence, but relies upon an insufficiency in the statement of facts to enable the appellate court to properly determine the rights of appellant, and reverses. In *Bloch v. Bloch*,<sup>19</sup> the trial judge failed to file findings and conclusions on seasonable request, but there was a statement of facts in the record. The court reversed, saying:

It is true there is a statement of facts in the record, but the evidence is conflicting upon material issues. In such a case, it is error to fail to comply with a request for such findings. It is a right granted by the statute, and we are unable to say that the failure to comply with such request is not harmful in such cases.

This is also the view taken in *Childress v. Wolf*.<sup>20</sup> Many cases have been reversed because of a conflict in the evidence.<sup>21</sup> And it appears that the appellate court will reverse even when there is a statement of facts in the record, and there is no conflict in the evidence.<sup>22</sup> The trial judge in *Garrow, MacClain & Garrow, Inc. v. Tex. & N. O. Ry. Co. et al.*,<sup>23</sup> failed to make his findings and conclusions within the statutory period. The evidence was not in dispute. There was a statement of facts in the record, approved and filed by the trial judge, but to which appellant did not agree or consent. However, the court found that the evidence raised more than one issue upon which appellant may have lost his case, and reversed upon that ground.

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<sup>16</sup>*Jacobs v. Nussbaum*, note 9, *supra*; *Sutherland v. Kirkland*, note 9, *supra*.

<sup>17</sup>203 S. W. 1171 (Tex. Civ. App., 1918).

<sup>18</sup>Note 6, *supra*.

<sup>19</sup>190 S. W. 528 (Tex. Civ. App., 1917).

<sup>20</sup>Note 14, *supra*.

<sup>21</sup>*Kyle v. Blanchette*, note 8, *supra*; *Peers v. Williams*, 174 S. W. 864 (Tex. Civ. App., 1915); *Stewart & Threadgill v. El Paso & S. W. Co.*, 207 S. W. 594 (Tex. Civ. App., 1919).

<sup>22</sup>*Garrow, MacClain & Garrow v. Ry.*, 273 S. W. 277 (Tex. Civ. App., 1925).

<sup>23</sup>Note 22, *supra*.

3. *Will the court always reverse where there is no statement of facts in the record?*

In *Texas & N. O. Ry. Co. v. Highland Dairy Co.*,<sup>24</sup> Reese, J., says:

He was entitled to have the written conclusions incorporated in the record, *and it is only when the statement of facts shows that he suffered no injury by the denial of this right that the judgment will not be reversed on this ground alone.* (Italics mine.)

But does it always follow that there will be a reversal if the trial judge has failed to comply with the statute, unless the court can look to the *statement of facts* and determine affirmatively from *it* that the appellant has not, and could not have, suffered injury? In *Galveston, H. & S. A. Ry. Co. v. Stewart & Threadgill*,<sup>25</sup> Mr. Justice Hamilton says:

The holding that the failure of the judge to file findings of fact and conclusions of law, where no statement of facts has been filed in the Court of Civil Appeals is reversible error, has been qualified to the extent that, *if it otherwise appears from the record that the appellant could have suffered no injury, such failure will not cause reversal.* For example, if defendant's pleadings were such that no proof entitling him to judgment could have legally been made he would not be entitled to a reversal upon failure of the trial court to file findings and conclusions. (Italics mine.)

It seems but common sense, that, if by looking at *any part of the record* it can be affirmatively determined that appellant has not, and could not have suffered injury, the court should not reverse. No cases exactly in point in support of this qualification can be found, but it is believed that it is sound.

Lewis Jeffrey.

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**BANKRUPTCY—PARTNERSHIP—FILING OF PETITION AGAINST FIRM BY PARTNER NOT AUTHORIZED.**—Should a petition in bankruptcy asking that a partnership be adjudicated a voluntary bankrupt be signed in the name of the partnership and purport to be the petition of the partnership, rather than of the individual members? Should all the partners be required to join in the petition, or should one, or less than all, have authority to sign for the firm? In a recent case,<sup>1</sup> the United States Supreme Court held that a voluntary petition by a member of a partnership cannot be sustained as the voluntary petition of the partnership, no authority from the other members being shown, though asking that the partnership be adjudicated bankrupt; that it cannot be

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<sup>24</sup>137 S. W. 137 (Tex. Civ. App., 1911).

<sup>25</sup>Note 3, *supra*.

<sup>1</sup>*Meek v. Centre County Banking Co.*, 45 S. Ct. 560 (1925). An incidental holding of this case is that a bankruptcy proceeding does not abate upon death of the petitioner, since it is not a mere personal action, but essentially a proceeding in rem, and a statutory, not a common-law, proceeding.

sustained as an involuntary petition against the partnership, because such a petition is not provided for by the act; and that General Order No. 8<sup>2</sup> and Form No. 2<sup>3</sup> are not warranted by the Bankruptcy Act of 1898,<sup>4</sup> in so far as they authorize one or less than all the partners to file a petition against the partnership, involuntary in its effect, whether voluntary or involuntary in form, without the consent of the others.

In this case Shugert filed in a federal district court in Pennsylvania a petition which "combined, in an anomalous and modified fashion, a 'debtor's petition' and a 'partnership petition' (Bankruptcy Forms Nos. 1 and 2)," alleging insolvency but failing to allege the commission of any act of bankruptcy, and asking that he, the partnership known as the Centre County Banking Co., of which he was a member, and the three other partners, individually, be adjudged bankrupt. The three other partners resisted the petition and moved to dismiss. On appeal the Supreme Court ordered the petition dismissed as to the partnership and as to the three partners as individuals. The order of dismissal as to the other partners individually was no doubt based on the failure of the petition to allege acts of bankruptcy committed by them, the petition being tested as an involuntary petition as to them.<sup>5</sup> As to the partnership the petition was dismissed for the reasons already given.

General Order No. 8, which is the eighth of thirty-eight general orders governing proceedings in bankruptcy adopted by the Supreme Court under authority given by Section 30 of the act, provides that any member of a partnership who refuses to join in a voluntary partnership petition shall be entitled to resist the prayer of the petition in the same manner as if the petition had been filed by a creditor of the partnership; and provides for notice to such a non-petitioning partner, and an opportunity for him to present proof that the partnership is solvent, or that it has not committed an act of bankruptcy. General Order No. 8 is substantially the same as General Order No. 18,<sup>6</sup> which was in force under the Act of 1867,<sup>7</sup> but the wording of the present act is materially different from that of the Act of 1867. Section 36 of the Act of 1867 authorized the adjudication in bankruptcy of "persons who are partners in trade"; while Section 5a of the Act of 1898, which is the act now in force, provides that "a partnership" may be adjudged a bankrupt. The courts have uniformly followed General Order No. 8, on the theory that "the general orders are effective as to the provisions

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<sup>2</sup>89 Fed. vi, 32 C. C. A. xi, 1 Fed. St. Ann. 608, COLLIER, BANKRUPTCY, 13th Ed., 1805.

<sup>3</sup>89 Fed. xxvii, 32 C. C. A. xxxii, 1 Fed. St. Ann. 618, COLLIER, p. 2058.

<sup>4</sup>Act of July 1, 1898, c. 541, 30 Stat. 544, as amended by Act of Feb. 5, 1903, 32 Stat. 797, Act of June 15, 1906, 34 Stat. 267, and Act of June 25, 1910, 36 Stat. 838; Comp. St. Secs. 9585-9656; COLLIER, p. 3347.

<sup>5</sup>Bankruptcy Act, Sec. 3b; *Medsker v. Bonebrake*, 108 U. S. 66, 27 L. Ed. 654, 2 Sup. Ct. 351 (1882).

<sup>6</sup>BRIGHTLY'S BANKRUPT LAW, p. 105.

<sup>7</sup>Act of March 2, 1867, c. 176, 14 Stat. 517; COLLIER, p. 3395.



of the act itself,"<sup>8</sup> and have attempted to reconcile it with the wording of the present act. This has resulted in conflicting opinion as to whether the partnership is to be considered an entity, and whether the entity of the partnership is to be regarded as the composite entity of the group,<sup>9</sup> or the unit entity of an extrinsic juristic person.<sup>10</sup> The courts have differed on whether a petition filed under General Order No. 8 is to be regarded as voluntary or involuntary as to the partnership, whether it must allege an act of bankruptcy by the partnership as well as insolvency, whether the prayer for an individual discharge is a separate proceeding and requires payment of separate fees, whether the trustee is authorized to administer the individual estates and use individual assets against firm debts, and whether a discharge of the partnership carries with it discharge of the partners from individual as well as firm debts. (The cases are collected in COLLIER, pp. 245-247; see also 37 HARV. L. REV. 614 for an excellent discussion of discharge of the individual partners.)

The decision in the principal case does away with the proceeding from which most of these questions have arisen by declaring that General Order No. 8, upon which a petition by a single partner asking for discharge of the firm has been based, is not warranted by the act. To replace General Order No. 8 the Supreme Court will no doubt soon promulgate a new general order, and a new form replacing Form No. 2. It is submitted that the new general order should provide that a partnership desiring to go into bankruptcy must file a voluntary petition purporting to be the petition of the partnership, and signed by all the members of the firm, unless adequate proof of authority from those not signing is made.

The act provides that "a partnership" may be adjudged a bankrupt;<sup>11</sup> that "any person" may file a voluntary petition in bankruptcy;<sup>12</sup> and that a partnership is a "person."<sup>13</sup> The Supreme Court has now held that a voluntary petition may not be considered the voluntary petition of the partnership when signed by less than all the members of the partnership. The courts might continue to use the present Form No. 2, which is in effect a joint petition of several individuals seeking a discharge of themselves and of the partnership of which they are members, and from now on require joinder of all the members before such a petition will be considered the voluntary petition of the partnership. But it would seem to be better practice, in view of the

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<sup>8</sup>In *re* Ollinger & Perry, 274 Fed. 970 (D. C., 1921).

<sup>9</sup>15 MICH. L. REV. 609, 626; *Francis v. McNeal*, 228 U. S. 695, 57 L. Ed. 1029, 33 Sup. Ct. 701 (1913); *In re Forbes*, 128 Fed. 137 (D. C., 1904); *Bear v. Liberty Nat. Bank*, 285 Fed. 703 (4th Circ., 1922); COLLIER, pp. 233-236.

<sup>10</sup>In *re* Bertenshaw, 157 Fed. 363, 85 C. C. A. 61, 17 L. R. A. (N. S.) 886, (8th Circ., 1907), overruled by *Francis v. McNeal*, *supra*.

<sup>11</sup>Bankruptcy Act, Sec. 5a.

<sup>12</sup>Bankruptcy Act, Sec. 4a.

<sup>13</sup>Bankruptcy Act, Sec. 1 (19).

quoted provisions of the Bankruptcy Act, to require a petition purporting to be the petition of the partnership, signed with the name of the partnership and with the names of the petitioning partners, who are executing this petition in the partnership name. The question at once arises, does one partner, or less than all the partners, have authority to file such a petition on behalf of the partnership?

The principal case mentions this question of authority, but does not decide it, since it is not presented by the facts. It is submitted that one partner, or less than all the partners, should not be given authority to file a partnership petition in the name of the firm. The generally accepted view is that a partner is not given authority by the partnership relation to make a general assignment for the benefit of creditors, "for such an assignment is not for the purpose of the partnership business, but is necessarily and intentionally destructive of that business."<sup>14</sup> An authority to file a petition in bankruptcy for the partnership without the consent of all would be contrary to the spirit of all the cases based on General Order No. 8, for they uniformly hold that notice to the non-petitioning partners and an opportunity for them to defend is required, an adjudication rendered without such notice being void.<sup>15</sup> The policy of all the cases has been strict protection of the interests of the non-petitioning partners. Inability to file a partnership petition would not seem to be a hardship on any member, for if he is insolvent and the other members are unwilling to file a voluntary partnership petition, he may file an individual petition, schedule the partnership debts and have himself discharged from both individual and partnership debts, the affairs of the partnership being wound up by the other partners in accordance with Section 5h.<sup>16</sup> If the partner is solvent individually he will not be likely to wish the partnership thrown into bankruptcy, as that would usually result in the taking of his individual assets to care for partnership debts.

Where less than all the partners file the petition adequate proof of authority from the other partners to take such action should be shown. In the case of a general assignment for the benefit of creditors one partner does not have authority as a result of the partnership relation to execute the assignment in the absence of actual authority from the others. But such authority may be implied from the conduct of the other partners, or from the circumstances.<sup>17</sup> Continued absence and abandonment of the business have been held sufficient circumstances to raise an inference of such authority, though temporary absence, sick-

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<sup>14</sup>BURDICK ON PARTNERSHIP, 3d Ed., p. 130.

<sup>15</sup>In *re Altman*, 95 Fed. 263 (D. C., 1899); In *re Russell*, 97 Fed. 33 (D. C., 1899); In *re Murray*, 96 Fed. 600 (D. C., 1899); COLLIER, BANKRUPTCY, 13th Ed., pp. 245-249.

<sup>16</sup>In *re Laughlin*, 96 Fed. 589 (D. C., 1899).

<sup>17</sup>BURDICK, p. 130; ROWLEY, PARTNERSHIP (1916), Sec. 458; GILMORE, PARTNERSHIP (1911), p. 297; MECHEM, PARTNERSHIP (2d Ed., 1920), Sec. 253.

ness, and insanity have been held not sufficient.<sup>18</sup> While these propositions are fairly well settled, they have been the subject of a marked conflict in the decisions. This conflict, coupled with the wide latitude which is left to the courts and to juries to determine when as a matter of fact authority is to be found or implied, will be the source of a very great uncertainty in the filing of partnership petitions if no specific provision is made. To avoid such uncertainty it seems that any general order should require that authority in writing, either general or special, from all the partners not signing, be filed along with the petition.

It will be noticed that the principal case presents an instance of individual hardship, in that Shugert, after he had prepared his petition in strict accordance with General Order No. 8, and had carried the case to the Supreme Court, found that the rule upon which he had relied was invalid, though promulgated by the Supreme Court itself. Since making the general order to be used in connection with the statute was necessarily a construction of the statute, the present decision is in effect a reversal of the court's former position.

*Vernon Elledge.*

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<sup>18</sup>Authorities cited in Note 17.

## RECENT CASES

AGENCY—INDEPENDENT CONTRACTOR.—Calhoun, a truck driver, contracted in writing to haul shipments for the defendant, Sherwin-Williams Co., and expressly stipulated for the control of the ways and means incident to the proper performance of the contract. While in the performance of his duties, he injured the plaintiff. Plaintiff sues the defendant company, alleging that the relation of master and servant existed. A demurrer to the petition was sustained. *Held*, that Calhoun was an independent contractor, and that one injured by him could not recover from the company. The court based its decision on the express stipulation in the contract, "That Calhoun should control all ways and means incident to the proper performance and completion of the contract." *McKinney v. Sherwin-Williams Company of Texas*, 271 S. W. 133 (Tex. Civ. App., 1925).

*Galloway v. King*, 272 S. W. 807 (Tex. Civ. App., 1925), presented the same question on similar facts. In that case Tillery contracted to haul 100 tons of hay for Galloway in sufficient quantities to keep the Steger Grain Co. "with hay all the time." Tillery was to use Galloway's truck, and the oil and gas were to be furnished by Galloway. Payment was to be made by the load. It was held that Tillery was an independent contractor, and the plaintiff who was injured by his negligence could not recover from Galloway. By the agreement Tillery was left free to make the delivery trip according to his own judgment, free from control by Galloway as to the details of the performance, as long as he accomplished the result of providing the Steger Grain Co. "with hay all the time."

In both decisions the court followed the well established rule for determining whether the relation of master and servant or independent contractor exists. This rule is found in *Wallace v. Southern Cotton Oil Co.*, 91 Tex. 21, 40 S. W. 399 (1897): "If Davis was an independent contractor in the sense that the company had no right of control as to the manner in which the work was to be done, then he was not the servant of the company and the plaintiff having been employed by him can not recover."

The modern English test is based upon *Laugher v. Pointer*, 5 Barn. and Cr. 547 (1826). The definition of workman in Section 13 of the English Workman's Compensation Act of 1916 is: "He who is an employe 'of service' distinguished from one 'for services'." The employe for services is considered an independent contractor. This is determined by the test: Who has the right to control the manner and the means of the work? *Dow v. McNeill*, 1924 SCOTTS LAW TIMES REPORTS, 767; *Binding v. Great Yarmouth Port and Haven Commissioners*, 16 B. W. C. C. 28, 92 L. J. (K. B.) 377 (1923). This test has been universally applied. *Wallace v. Southern Cotton Oil Co.*, 91 Tex. 18, 40 S. W. 399 (1897), *Gilbert Mfg. Co. v. Connelley*, 253 S. W. 551 (Tex. Civ. App., 1924); *Kaw Boiler Works v. Frymer*, 100 Okla. 81, 227 Pac. 453 (1924); *Linneham v. Rollins*, 137 Mass 123, 50 Am. Rep. 287 (1884). The result of the application of this test must depend upon the facts in each case; as, the independent nature of the business; *Moor v. Lee*, 109 Tex. 391, 21 R. C. L. 394-395 (1919); the existence of a contract for the performance of a specified piece of work; *Groesbeck v. Pinson*, 21 Tex. Civ. App. 44, 50 S. W. 620 (1899); *Crow v. McAdoo*, 219 S. W. 241 (Tex. Civ. App., 1920); the agreement to pay a fixed price for the work; *Texas Refining Co. v. Alexander*, 202 S. W. 131 (Tex. Civ. App., 1918); *Edmundson v. Coca Cola Co.*, 150 S. W. 273 (Tex. Civ. App., 1912); the furnishing by the employe of the necessary materials; *Shannon et al. v. Western Indemnity Co. et al.*, 257 S. W. 522 (Tex. Comm. App., 1924); the fact that the employer has the right to end particular service without regard to the final result of the work; *Steger v. Barrett*, 124 S. W. 174 (Tex. Civ. App., 1910); *United States Fidelity and Guaranty Co. v. Lowry*, 231 S. W. 818 (Tex. Civ. App., 1921). The test is not whether they actually



exercised control over the manner in which, or the means by which the work was to be done, but whether they had the right to do so; *Corrigan Lee and Halpin v. Heubler*, 167 S. W. 159 (Tex. Civ. App., 1914); nor is the fact that the employer has exercised control conclusive of the fact that he had the right to do so; *Southwestern Telegraph and Telephone Co. v. Paris*, 39 Tex. Civ. App. 424, 87 S. W. 724 (1905). The retention of the right of supervision of the work, for the purpose of seeing that it is done according to the contract is not sufficient to destroy the relation of independent contractor. *Walker et al. v. Texas & N. O. Ry. Co.*, 51 Tex. Civ. App. 391, 112 S. W. 430 (1908); *Mason v. Hoge*, 116 S. W. 322 (Ct. of Civ. App. of Ky., 1909). Ordinarily the finding of the facts from which the relationship is determined is in the province of the jury, the court applying the test of the facts as found. *Trachtenberg v. Castillo*, 257 S. W. 657 (Tex. Civ. App., 1924); *Moore and Savage v. Kopplin*, 135 S. W. 1033 (Tex. Civ. App., 1911). But when the relationship is determined from an unambiguous contract, as in the principal case, or where the evidence is undisputed it becomes a question of law for the court. *Williams v. Gulf Refining Co.*, 229 S. W. 959 (Tex. Civ. App., 1921).

The final analysis would be that an independent contractor is one who renders service in the course of an occupation representing the will of his employer only as to the result of his work, and not as to the means by which it is accomplished, and who in the actual execution of his work is not under the order or control of his employer. *Prairie Oil and Gas Co. v. Wright*, 238 S. W. 974 (Tex. Civ. App., 1921); *Cunningham v. Railway Co.*, 51 Tex., 503, 32 Am. Rep. 632 (1879); *Pack v. Mayor of City of New York*, 4 Seld. (N. Y.), 222 (1853); *James v. Tobin-Sutton*, 195 N. W. 848 (Wis., 1923). In this regard control means dictation as to the methods, not supervision of results. *Walker et al. v. Texas & N. O. Ry. Co.*, *supra*, 32 YALE L. JOUR. 407. California has adopted a statutory definition of servant which conforms to the one given above. 1923 Civil Code of California, Section 2009; *Giacomini v. Pacific Lumber Co.*, 5 Calif. App. 218, 89 Pac. 1059 (1907).

The court properly sustained the demurrer to the plaintiff's petition in the principal case; the relationship being determined from an unambiguous contract, presenting a question of law for the court. *Williams v. Gulf Refining Co.*, *supra*. On the general point involved, see 8 VA. L. REV. 381; 19 ANNO. CAS. 3. D. S.

APPEAL AND ERROR—EVIDENCE—BILL OF EXCEPTIONS—AFFIRMATIVE SHOWING THAT TRIAL COURT WAS INFORMED OF TENOR OF EXPECTED EVIDENCE.—In support of a plea of self-defense, on trial for murder, the defendant offered evidence of uncommunicated threats. The State interposed a general objection which was sustained. In his bill of exceptions the appellant set forth the matter that the witness was expected to prove but the bill did not state that the trial court was informed, at the time ruling was made, what the evidence would be. *Held*, that the evidence was erroneously excluded. Lattimore, J., dissented. *Reynolds v. State*, 274 S. W. 974 (Tex. Cr. App., 1925).

In order to save an exception to a ruling excluding evidence the party offering it must inform the court of the tenor of the offered testimony at the time the ruling is made. *Cunningham v. A. & N. W. Ry.*, 88 Tex. 534, 31 S. W. 629 (1895); *Rush v. French*, 1 Ariz. 99, 25 Pac. 816 (1874); WIGMORE ON EVIDENCE, 2nd Ed., Sec. 20. An exception is recognized when the very form of the question indicates the tenor and competency of the evidence expected, *Buckstaff v. Russell & Co.*, 151 U. S. 626, 38 L. Ed., 292, 14 Sup. Ct. 448 (1893); *Hartnett v. Boston Store of Chicago*, 265 Ill. 331, 106 N. E. 837 (1914), or when, as on cross-examination, the questioner does not know what the answer will be. *Cunningham v. Ry.*, *supra*. The bill of exceptions presented to the higher court must state what was expected to be proved, *G. C. & S. F. Ry. Co. v. Locker*, 78 Tex. 279, 14 S. W. 611 (1890), but although it does, there is no error, if it also shows that the trial court was not apprised at the time of what was expected to be proved by the witness. *Welch v. State*, 57 Tex. Cr. R. 11, 122 S. W. 880 (1909); *Guilmartin v. Padgett*, 138 S. W. 1143 (Tex. Civ. App., 1911).

Must the bill of exceptions, complaining of the exclusion of evidence, show affirmatively that the purport of such testimony was made known to the court at the time of the exclusion? Or does the duty rest upon the trial court to qualify a bill of exception so as to show that the purport of the evidence was not made known to him at the time of the ruling? No authority was found which supports the holding of the majority that an approved bill is sufficient showing, and thus that the duty rests upon the trial court to qualify the bill if in fact he was not apprised of the purport of the offered evidence at the time of the ruling. WIGMORE ON EVIDENCE, Sec. 20, and the cases bearing on the question support the principle announced in the dissent which requires an affirmative showing. *Mills v. Winter*, 94 Ind. 329 (1883), character testimony was excluded; the bill of exceptions did not state that the required witnesses were in court at the time. The appellate court held that "the party excepting should see to it that the bill of exceptions is so made up as to show affirmatively that the offer should have been sustained." *Griffin v. Henderson*, 117 Ga. 382, 43 S. E. 712 (1903), directly in point, states the rule clearly: "while the motion says what she would have testified, it does not appear that the court was informed thereof at the time he excluded her; therefore, we are not permitted to consider the assignment of error." While no Texas case directly in point was found, *Ferguson v. Cochran*, 45 S. W. 30 (Tex. Civ. App., 1898), even more strongly illustrates the principle that an affirmative showing of error must be made. A deed was offered in evidence and objection to it was overruled. In his bill of exceptions the appellant failed to state the fact that the deed was read, though it was intimated in the statement of facts. The court said: "The appellant ought to show us error, and he must clearly do so, to authorize us to reverse the solemn judgment of any court." Cf. *Sailor v. Caldwell*, 65 Kans. 86, 68 Pac. 1085 (1902). If there is any relaxation of the rule to be made it should be in this class of cases involving documentary evidence which is necessarily before the court from the very moment the offer is made.

W. Q. B.

BANKS AND BANKING—STATE GUARANTY FUND—CHANGING FROM INTEREST TO NON-INTEREST BEARING DEPOSIT AFTER INSOLVENCY.—Pilcher deposited \$6000 with a State Guaranty Fund bank, on time deposit, and received an interest bearing certificate, payable December 31, 1921. On December 24, following, upon hearing that the bank was in financial difficulties, he surrendered the certificate and changed the deposit to a general (non-interest bearing) one. The bank was insolvent, and the officers were "contemplating insolvency" at the time. The bank was closed on the following business day. Pilcher sued to establish his claim against the State Guaranty Fund. Held, that the action of the officers of the bank and the depositor, in taking up the interest bearing deposit certificate and issuing a general, non-interest bearing deposit in lieu thereof, while the bank was insolvent and officers "contemplating insolvency," was a fraud on the State Guaranty Fund, and therefore void. *State Banking Board v. Pilcher*, 270 S. W. 1004 (Tex. Comm. of App., 1925).

This seems to be the first instance in which this identical issue has been passed upon in any jurisdiction. A time depositor is not protected by the guaranty fund. *Kidder v. Hall*, 113 Tex. 42, 251 S. W. 497 (1923); *Lankford v. Schroeder*, 47 Okl. 279, 147 Pac. 1049, L. R. A. 1915F, 623 (1915). The only classes of obligations protected under the Texas law are non-interest bearing and unsecured deposits. *Kidder v. Hall*, *supra*. However, the certificate of general deposit does not, of itself, entitle the holder to the protection of the guaranty fund. The law looks through all semblances and forms to ascertain the actual fact whether or not there has been a bona fide deposit, and, if not, the guaranty fund does not protect the transaction, no matter how it may be evidenced. *Kidder v. Hall*, *supra*; *State v. Gross State Bank of Gross*, 202 N. W. 460 (Neb., 1925). REV. CIV. STAT. 1911, Art. 554, forbids an officer of a bank organized

under the Guaranty Fund Act to receive deposits after he knows of the insolvency of the bank. Art. 551 provides that if a bank "shall find itself to be in a failing condition, it shall immediately place itself in the hands of the commissioner," and, further, that "all deposits . . . for the use of . . . creditors . . . in contemplation thereof (insolvency), made with a view to prevent the application of its assets in the manner prescribed by this title or with a view to the preference of one creditor to another, shall be utterly null and void." It is submitted that the change of deposits in the case at hand, under the circumstances, came under the inhibition of the statute as preventing "the application of its assets in the manner prescribed" by the Guaranty Fund Act. In view of the language of Arts. 551 and 554, the court in the instant case reasoned, "At the time when Pilcher and the officers of the bank attempted to change the character of the deposit, the insolvency and contemplated insolvency had already fixed the status of the creditors . . . as to which funds they could look to for payment," and an attempt at that time to change the relation of the creditors toward the guaranty fund was a fraud on the fund, and void. The decision in such cases rests upon broad, equitable principles. *Hill, County Treasurer v. Kavanaugh*, 118 Ark. 134, 176 S. W. 336, 4 A. L. R. 1 (1915). (This case, though it did not arise under a guaranty fund law, involved the validity of a change of deposit from an individual deposit to one in the official capacity, when the bank was insolvent, in an attempt to procure the protection of stockholders' liability for public funds. The deposit was in fact one of public funds.) It is submitted that the case of *Chapman v. Mooney*, 257 S. W. 1106 (Tex. Civ. App., 1924), although it was decided prior to the principal case, announces a sound limitation upon the doctrine of that case in holding that, where the depositor has no knowledge of the insolvency of the bank and changes his deposit to a general deposit, there is no fraud and he is entitled to share in the guaranty fund. This is in accord with equitable principles requiring mala fides to constitute fraud.

The case under discussion would now fall within the scope of Art. 447 of the REV. CIV. STAT. 1925, which provides that "no secured deposit and no certificate of deposit, whether bearing interest or not, or any other kind of interest bearing deposit, that shall have been changed to a non-interest bearing and unsecured deposit within ninety days prior to the closing of a bank . . . shall be protected or insured under the Guaranty Fund." This statute, having been adopted in 1923, subsequent to the time when the facts in the principal case arose, has no bearing on that case, but doubtless will have the effect in future cases of debarring such transactions within the ninety day period from participation in the guaranty fund, regardless of any question of fraud. Undoubtedly, the statute, since it does not mention fraud, will not be held to be exclusive as to cases involving fraud which arise prior to the ninety day period.

W. A. M., Jr.

CONSTITUTIONAL LAW.—INTERSTATE COMMERCE.—LICENSE TAX IMPOSED ON SOLICITORS REQUIRING ADVANCE PAYMENT ON HOSIERY ORDERS TO BE SHIPPED TO BUYERS FROM ANOTHER STATE.—Salesmen of the Real Silk Hosiery Co. went from house to house soliciting orders. With each order a deposit of \$1 was required, which was retained by the salesman as their sole compensation. The order was sent to the local sales manager, who in turn forwarded it to the mills at Indianapolis. The city of Portland, Ore., passed an ordinance which required every person going from place to place soliciting orders for future delivery and receiving payment or deposit of money in advance of delivery, to secure a license and file a bond conditioned on final delivery of the ordered goods. It was expressly declared that the ordinance was passed to prevent the perpetration of frauds. The ordinance was attacked in a United States District Court, in a suit to enjoin the city from enforcing it against the solicitors of the hosiery company on the ground that it interfered with and burdened interstate commerce, and was, therefore, repugnant to Article 1, Section 8, of the Federal Constitution. The Supreme Court, in reversing the Circuit Court of Appeals, held that the



ordinance imposed a burden on interstate commerce and, therefore, violated the Commerce Clause of the Federal Constitution. *Real Silk Hosiery Co., Inc., v. City of Portland*, 69 L. Ed. 639, 45 Sup. Ct. 525 (1925).

There are many instances where the Supreme Court has approved state legislation, as a valid exercise of the police power, though it burdened interstate commerce. Introduction of diseased cattle may be entirely prohibited, or subjected to such regulations as the state legislatures may choose to impose. *M. K. & T. R. R. Co. v. Haber*, 169 U. S. 613, 42 L. Ed. 678, 18 Sup. Ct. 488 (1898). In *Plumley v. Massachusetts*, 155 U. S. 461, 39 L. Ed. 223, 15 Sup. Ct. 154 (1894), a Massachusetts statute prohibiting the sale of oleomargarine artificially colored so as to cause it to look like yellow butter, and so brought into the state, was held not to conflict with the commerce clause of the Constitution. The purpose of this law was to prevent fraud and imposition on the public. Also in *Pure Oil Co. v. Minnesota*, 248 U. S. 158, 63 L. Ed. 180, 39 Sup. Ct. 35 (1918), the Supreme Court upheld a state statute providing for inspection of illuminating oils and gasoline, while yet in interstate commerce, and imposing a charge upon the owner reasonably sufficient to cover the cost of inspection, there being no conflicting regulations by Congress and the purpose of the law being to promote the public safety and to protect the public from fraud and imposition.

In the principal case, the ordinance was limited in its scope, applying only to solicitors who required an advance payment before final delivery of the ordered goods. Its purpose was to insure the eventual receipt of the goods by the customer, and thus prevent the perpetration of fraud. It was not an occupation tax, nor one for revenue purposes. The cases cited by the Supreme Court in its opinion as supporting the holding that the ordinance was invalid may be distinguished on the ground that the statutes there passed upon were enacted for revenue purposes only and were not designed to protect the public from fraud. *Alpha Portland Cement Co. v. Massachusetts*, 69 L. Ed. 549, 45 Sup. Ct. 477 (1925), arose out of an excise tax on foreign corporations which was construed to be a tax on interstate commerce. In *Shafer v. Farmer's Grain Co.*, 69 L. Ed. 554, 45 Sup. Ct. 481 (1925), the statute attempted to impose onerous restrictions on all buyers of wheat, 90 per cent of which was used in interstate commerce. The remaining cases cited were instances of attempts to levy occupation taxes, as such, on regularly employed salesmen for the privilege of selling within the state or city. They were not purported to be passed for prevention of fraud or under the state's residuary police power.

It might be questioned whether the commerce clause applied at all in the principal case, in view of the independent character of plaintiff's solicitor. The Circuit Court of Appeals raised this question, although it did not base its decision upon it. Even if it be conceded that the ordinance would have some indirect effect on interstate commerce, should this cause it to be held invalid, in view of the fact that it was passed to prevent fraud? The Supreme Court in *Austin v. Tennessee*, 179 U. S. 343, 349, 45 L. Ed. 224, 21 Sup. Ct. 132 (1900), said: ". . . that, if the action of the state legislature were a bona fide exercise of its police power, and dictated by a genuine regard for the preservation of the public health or safety, such legislation would be respected, though it might interfere indirectly with interstate commerce." The Circuit Court of Appeals emphasized the point that the ordinance was passed to prevent fraud and applied only to solicitors who demanded deposits of money in advance of final delivery. It held it was a justifiable exercise of the police power. It is submitted that its holding is more in consonance with good public policy. Also it is not without authority to support it.

M. C.

CONSTITUTIONAL LAW—RATE REGULATION BY MUNICIPALITIES IN DEROGATION OF FRANCHISE PROVISIONS.—Geller, a citizen of Dallas, brought suit to restrain the street railway company from raising its fare in accordance with an ordinance passed by the board of commissioners of the city, on the ground, among others,



that the maximum rate fixed by the franchise under which the company was operating could not be raised during the life of the franchise without impairing the obligation of contract, in contravention of Art. 1, Sec. 10 of the Federal Constitution and Art. 1, Sec. 16 of the Texas Constitution. *Held* (affirming, on this point, the Dallas Court of Civ. App., 245 S. W. 254), that Sec. 17 of Art. 1 of the Constitution of Texas, which provides that "no irrevocable or uncontrollable grant of special privilege or immunities shall be made; but all privileges and franchises granted by the legislature, or created under its authority, shall be subject to the control thereof" would be read into the franchise accepted after the adoption of the constitution, as reservation of authority to the municipality to further control and regulate the grant, and therefore, the ordinance authorizing the higher rate did not impair the contract obligation. *Dallas Ry. Co. v. Geller*, 271 S. W. 1106 (Sup. Ct. Tex., 1925).

Since the decision by the Supreme Court of the United States in the case of *Trustees of Dartmouth College v. Woodward*, 4 Wheat. 518, 4 L. Ed. 629 (1819), it has been settled that a charter or franchise is a contract, but the courts have never followed the doctrine to its logical consequences, and there has been some outspoken criticism of it. See the opinion expressed by Judge Roberts in a note to *The State v. So. Pac. R. R. Co.*, 24 Tex. 80, at 131 (1859); *Robertson v. Wilmington & Phila. Traction Co.*, 7 Boyce (Del.) 155, 104 Atl. 839 (1918). Judge Marr, in *Mayor et al. v. Houston St. Ry. Co.*, 83 Tex. 548 (1892), points out that it was probably disapproval of the doctrine of the *Dartmouth College Case* which led the framers of the Constitution of 1876 to include the provisions of Art. 1, Sec. 17, quoted above. The opinion by Judge Marr also made it clear that the provisions were not to be construed as giving the legislature or the municipalities authority to act capriciously in the revocation and control of the grants of privilege, but merely reserved to them the power to act upon the grants in the interest of the public welfare. Rate regulation has been held, by most of the courts, an exercise of the police power, and on account of the possibility of the franchise agreement interfering with the exercise of the power, it becomes an implied limitation in the contract. *State v. Burr*, 79 Fla. 290, 84 So. 61 (1920); *City of Woodburn v. Pub. Ser. Comm.*, 82 Ore. 114, 161 Pac. 391 (1916); *City of Camden v. Ark. Light & Pow. Co.*, 145 Ark. 205, 224 S. W. 444 (1920). However, in the absence of constitutional limitations, such as Art. 1, Sec. 17 of the Texas Constitution, the legislature may grant authority to the municipality to fix rates and if the municipality with clarity and certainty fixes a rate by franchise agreement, it is not to be changed during the contract period. *City of Ansonia v. Ansonia Water Co.*, 125 At. 474 (Conn., 1924); *City of Columbus v. Pub. Util. Comm.*, 103 Ohio Sup. 79, 133 N. E. 800 (1921); *Virginia-Western Pow. Co. v. Commonwealth ex rel. City of Clifton Forge*, 125 Va. 469, 99 S. E. 723 (1919), certiorari denied, 40 Sup. Ct. 179.

The decision in the principal case is well supported by authority and is in accord with the settled construction of Art. 1, Sec. 17 of our Constitution. *San Antonio Traction Co. v. Altgelt*, 200 U. S. 304, 26 Sup. Ct. 261, 50 L. Ed. 491 (1905); *Tampa Waterworks Co. v. City of Tampa*, 199 U. S. 241, 26 Sup. Ct. 23, 50 L. Ed. 170 (1905).

W. L. M.

CONTEMPT—ATTORNEY'S LETTER TO JUDGE HELD CONTEMPTUOUS—DUE PROCESS IN CERTAIN CRIMINAL CONTEMPT PROCEEDINGS.—Pending further action in a case in which a verdict had been returned against his client, C, an attorney, wrote a letter to the presiding judge in which he characterized the judge as not being "big enough and broad enough" to overcome personal prejudice. The letter, marked "Personal," was delivered by the client to the judge in his chambers adjoining the courtroom. Both C and his client were sentenced for contempt without being allowed a hearing or the assistance of counsel. *Held*, that the letter was contemptuous, but (reversing, on this point, the Circuit Court of Appeals, Fifth Dist., 295 Fed. 292) that the contempt not having occurred in open court, due process demanded that the accused be notified of the charge against him and that he be

allowed counsel, if requested, and a reasonable time to prepare a defense and introduce testimony in extenuation of the offense and in mitigation of the penalty. *Cooke v. United States*, 45 Sup. Ct. 390 (1925).

Personal letters addressed to a judge by an attorney in a case pending before him, in which the acts or attitude of the judge are criticised in an insolent or threatening manner, have been regarded as criminal contempts in both the courts of this country and of England. *United States v. Huff*, 206 Fed. 700 (1913); *In re Pryor*, 18 Kan. 72, 26 Am. Rep 747 (1877); *Charlton's Case*, 2 Myl. & C. 316 14 Eng. Ch. 316, 40 Reprint 661 (1837); *In re Wallace*, L. R. 1 P. C. 283, 4 Moore P. C. N. S. 140, 16 Reprint 269 (1866). The writing and publication of such a letter was held contemptuous in *Ex parte Craig*, 282 Fed. 138 (1922). A contrary decision under the New York contempt statute is found in *In re Griffin*, 1 N. Y. S. 7 (1888).

The Federal courts have the power to punish criminal contempts of their authority in the cases, among others, arising from "—misbehavior of any person in their presence or so near thereto as to obstruct the administration of justice—." JUD. CODE, sec. 268 (U. S. COMPILED STAT. 1913, sec. 1245). Due process of law in the exercise of the power to punish this type of criminal contempts ordinarily consists of issuing a rule to show cause containing a statement of the nature of the contempt charged, followed by a hearing by attorney, if requested, and the admission of testimony relevant to the issue of guilt or mitigation of the penalty to be imposed. *Savin, Petitioner*, 131 U. S. 267, 33 L. Ed. 150, 9 Sup. Ct. 699 (1888); *Franzone v. Tumminelli*, 67 Misc. 549, 123 N. Y. S. 455 (1910). However, when the contemptuous conduct occurs *in open court* and *in the presence of the judge* it is conceived as tending to publicly demoralize the court's authority, and, all of the facts being within the knowledge of the judge, he may punish the offender without a hearing in any form. *Ex parte Terry*, 128 U. S. 289, 32 L. Ed. 405, 9 Sup. Ct. 77 (1888); Frankfurter and Landis, "Power of Congress Over Procedure in 'Inferior' Federal Courts," 37 HARV. L. REV., 1010 at 1042 et seq. (1923).

Chief Justice Taft, in the principal case, draws the distinction between the procedure necessary to constitute due process in the two situations with clarity and accuracy. He points out that the extreme doctrine of summary punishment should be carefully confined in its use to the particular facts to which it is properly applicable.

W. L. M.

CONTRACTS—ACCEPTANCE BY BENEFICIARY IN CONTRACTS FOR THIRD PARTY.—In part consideration for land, C assumed payment of notes owed by his grantor, B. C reconveyed to B who reassumed payment of the notes before A accepted C's assumption. Held, that reconveyance by C and reassumption by B before acceptance by A terminated B's liability on his assumption. *Edwards v. Beale*, 271 S. W. 887 (Tex. Comm. App., 1925).

In Texas a contract for the benefit of a third party is binding even though the beneficiary furnishes no part of the consideration. *McGowan v. Shrimp*, 21 Tex. 21 (1881); *Spann v. Cochran*, 63 Tex. 240 (1885); *Allan v. Traylor*, 212 S. W. 945 (Tex. Comm. App., 1919). Before acceptance by the beneficiary the immediate parties may rescind. *Huffman v. Mortgage Co.*, 13 Tex. Civ. App. 169, 36 S. W. 306 (1896); *Hill v. Hoeldtke*, 54 Tex. Civ. App., 201, 117 S. W. 217 (1909); *Hill v. Horstman*, 61 Tex. Civ. App. 148, 128 S. W. 642 (1910). After acceptance, the promisor is bound though the acceptance may remain unknown to him. *Caraway v. Fowler*, 255 S. W. 995 (Tex. Civ. App., 1923). What constitutes acceptance? Some courts have held that rescission, even before knowledge has come to the beneficiary, is impossible. *Waterman v. Morgan*, 114 Ind. 237, 16 N. E. 590 (1888); *Cobb v. Heron*, 73 Ill. App. 654, 180 Ill. 49 (1893); WILLISTON ON CONTRACTS, Sec. 396. In *Peoples Bank & Trust Co. v. Weindinger*, 73 N. J. L. 433, 64 Atl. 179 (1906), an overt act, signifying acceptance, was held to be necessary. Logically, in Texas, knowledge of the contract on the part of the bene-

fiary is indispensable to his acceptance. Since the acceptance does not have to be formal or even brought home to the notice of the promisor, *Caraway v. Fowler, supra*, it may be that when the point arises, our court will hold that knowledge without dissent within reasonable time will be sufficient acceptance.

E. R.

**CONTRACTS—INJUNCTION TO RESTRAIN BREACH BY EMPLOYEE OF CONTRACT IN RESTRAINT OF TRADE.**—Plaintiff was a corporation engaged in the business of delivering ice and had purchased the ice business and good will of another firm who was employing the defendant at the time of the sale. Under a plan to secure all the employees of the selling firm the plaintiff engaged the defendant by a contract which provided that the defendant should have the same territory for the delivery of ice as he had had under his former employment and if for any reason his employment with the plaintiff should cease then he would not engage in the ice business within that territory or within five squares therefrom for a period of three years following. Defendant worked under this contract from November 28, 1924, until February 16, 1925, when he quit and went to work for a competing ice company in the same territory. Evidence showed that it was a part of the defendant's work to solicit business in his territory and that it was largely through the work of the drivers in this capacity that trade for the plaintiff was created. Plaintiff proved that after the defendant started work for the other company sales dropped from one and one-half tons daily to little more than one hundred pounds. A temporary injunction granted to restrain the defendant from so working was later dissolved and the ice company appealed from the order of dissolution. *Held*, that the defendant should be restrained from violating his negative covenants but only as to the territory proper and not as to the five squares therefrom. *City Ice Delivery v. Evans*, 275 S. W. 87 (Tex. Civ. App., 1925).

It has long been the settled law in Texas as well as elsewhere that the vendee of a business could enjoin the vendor from breaching a covenant not to enter into a similar business where the period and territory of restraint were reasonable. *Gates v. Hooper*, 90 Tex. 563, 39 S. W. 1079 (1897). In deciding that the same doctrine shall apply in the cases of negative covenants by an employee the court not only followed the general current of authority but also the holding in a previous Texas case. *Patterson v. Crabb*, 51 S. W. 870 (Tex. Civ. App., 1899). In the case of *Miller v. Chicago Portrait Company*, 195 S. W. 619 (Tex. Civ. App., 1917), the Court of Civil Appeals at San Antonio recognized the doctrine but refused an injunction on the grounds that a provision for liquidated damages was intended to be the exclusive remedy. The case of *American Ice Company v. Lynch*, 74 N. J. Eq. 298, 70 Atl. 138 (1908), was almost identical in facts with the present case and the court held that regardless of a provision for liquidated damages injunction would nevertheless be granted. The rule seems to be that where the employee is placed in such a position that the employer's business is dependent upon the employee's acquaintance and personal influence with the customers then equity will enjoin a breach of his covenant not to enter the same territory in a competing business if the provisions as to the time and territory of restraint are reasonable. The reason for the rule is based on the analogy of this situation to that where the covenant is made in the sale of a business, and on the desirability of enabling the employer to contract against such disturbance of the good will of his business. *Eureka Laundry Company v. Long*, 146 Wis. 205, 131 N. W. 412 (1911); *McCall v. Wright*, 198 N. Y. 143, 91 N. E. 516, 31 L. R. A. (N. S.), 249 (1910); 3 WILLISTON ON CONTRACTS, Sec. 1643. But the plaintiff must show that irreparable damage has been or is about to be done him, *Menter v. Brock*, 147 Minn. 407, 180 N. W. 553, 20 A. L. R. 857 (1920), and that he is not seeking to enforce the covenant merely as a disciplinary measure. *Sternberg v. O'Brien*, 48 N. J. Eq. 370, 22 Atl. 348 (1891). However, in the absence of express covenant equity will not grant relief against the ex-employee's working in a competitive business. *Federal Laundry v. Zimmerman*, 218 Mich. 211, 187



N. W. 335 (1922); *Fulton Laundry Company v. Johnson*, 140 Md. 359, 117 Atl. 753 (1922). It is obvious that the plaintiff in the present case brought his case within these requirements.

The court, while finding the restriction as to five squares, was unreasonable, held that the stipulations defining the territory to be divisible and enforced the contract only in the original territory. In contracts like this, not being *contra bonos mores*, where the stipulations as to the territory are plainly divisible, courts will enforce them to the extent they are valid and discard the invalid part. 1 JOYCE ON INJUNCTIONS, Sec. 472; *Underwood v. Barker*, 80 Law Times 306 (1899), (employee covenanted not to enter same business in the United Kingdom and several foreign countries; enforced as to the United Kingdom; *Trenton Potteries v. Oliphant*, 58 N. J. Eq. 507, 43 Atl. 723, 46 L. R. A. 255 (1899); (vendor of business agreed not to enter a competing business within any state in United States; held enforceable as to New Jersey); 24 L. R. A. (N. S.), 942. Other features of the contract may also be divisible, such as the agreement as to the character of the work not to be done. *Sherman v. Pfefferkorn*, 241 Mass. 468, 135 N. E. 568 (1922). The court in the principal case correctly adopted this practical solution of the problem in order that contract between the parties would not be entirely defeated.

J. N. J.

CRIMINAL LAW—COMMENT BY PROSECUTING ATTORNEY ON FAILURE OF DEFENDANT TO TESTIFY.—The defendant appeals from a conviction of rape basing his appeal on an alleged violation of C. C. P., Art. 790, which provides that a prosecuting attorney shall not comment on or allude to the failure of the defendant to testify in his own behalf. The defendant did not testify during the trial, and in his argument to the jury the prosecuting attorney said that they were bound to accept the statement of the prosecuting witness as true because no witness had been produced testifying that the same was not true and because it stood uncontradicted. *Held*, that these remarks were in violation of the statutes and constituted reversible error. The court expressed the opinion that since there was no other witness who could have denied the direct statements of the prosecutrix, the remarks of the attorney must of necessity have referred to the failure of the defendant to testify. *Grimes v. State*, 271 S. W. 898 (Tex. Cr. App., 1925).

A statement by the prosecuting attorney that the defendant has produced no witnesses is not error where there are *other* witnesses beside the defendant who could have been produced. *Henry v. State*, 54 S. W. 592 (Tex. Cr. App., 1899); *Boone v. State*, 90 Tex. Cr. Rep. 374, 235 S. W. 580 (1921).

In *Rogers v. State*, 78 Tex. Cr. Rep. 225, 180 S. W. 674 (1915), it is held that a bare allusion to the failure of the defendant to testify is not error. Where it is only by a strained construction of the language used that the remarks of the attorney can be made to refer to the failure of the defendant to testify it is not reversible error. *Combs v. State*, 55 Tex. Cr. Rep. 334, 116 S. W. 584 (1909). A reference to the defendant's failure to testify made prior to the time when he may be called upon to testify is not error. *Diebel v. State*, 24 S. W. 26 (Tex. Cr. App., 1893). A new trial will not be granted for a mere incidental mention of the failure of the defendant to testify unless it reasonably appears that his cause has been prejudiced thereby. *Gatlin v. State*, 72 Tex. Cr. Rep. 516, 163 S. W. 428 (1914). It seems that there is no difference in principle between the cases cited and the principal case. The inhibition of the statute is meant to prevent the attorney in his argument from commenting on the failure of the defendant to testify and deducing the conclusion that he is guilty because of such failure. *Burks v. State*, 55 S. W. 825 (Tex. Cr. App., 1900).

*Bruce v. State*, 53 S. W. 867 (Tex. Cr. App., 1899), is directly in conflict with the principal case, but was overruled in *Barnard v. State*, 48 Tex. Cr. Rep. 122, 86 S. W. 761 (1905). The rule in the principal case seems to be well established in Texas and is supported by the following cases: *Dawson v. State*, 24 S. W. 414



(Tex. Cr. App., 1893); *Barnard v. State*, *supra*; *Deary v. State*, 62 Tex. Cr. Rep. 352, 137 S. W. 699 (1911); *Flores v. State*, 60 Tex. Cr. Rep. 25, 129 S. W. 1111 (1910); *Shaw v. State*, 57 Tex. Cr. Rep. 474, 123 S. W. 691 (1909).

The following cases of other jurisdictions are in accord with the rule of the principal case: *People v. Payne*, 131 Mich. 474, 91 N. W. 739 (1902); *Prince v. State*, 93 Miss. 263, 46 So. 537 (1908); but the following cases are contra to this rule: *State v. Hasty*, 121 Ia. 519, 96 N. W. 1115 (1903); *MacDonald v. Commonwealth*, 177 Ky. 224, 197 S. W. 665 (1917).

In the present class of cases whose facts are so peculiar as to make an otherwise legitimate argument, which infringes the statute only indirectly, a cause for reversal, there is a conflict between the right of the attorney to make proper use of evidence or absence of evidence in summing up and the statutory right of the defendant not to have his silence used against him.

R. T. M.

**CRIMINAL LAW—EVIDENCE—SMELLING AND TASTING OF LIQUOR BY JURY—RIGHT TO USE SENSES.**—In prosecution for possessing intoxicating liquor for purposes of sale, prosecuting attorney, in opening argument, passed a jar of the liquor to the jury, asking them to examine and taste it, and "see whether or not they thought it intoxicating." *Held*, that this was reversible error. "It is wrong for jurors to be called on to exercise individual judgment in deciding such cases as are here involved. A weapon may not be introduced and the jury called upon, from their own inspection, handling, and judgment to thus decide whether it is deadly; neither may a jury be made witnesses to decide whether a given liquor is intoxicating." *Skinner v. State*, 274 S. W. 133 (Tex. Ct. Crim. App., 1925).

Upon the question of jurors smelling and tasting liquor, the diverse holdings of American courts have called forth a recent comment (6 Minn. L. Rev., 249) where seven distinct rules are stated. *Thomson v. State*, 72 Tex. Cr. Rep. 6, 160 S. W. 685 (1913), is there correctly cited as holding that it was not error for jurors to handle and smell liquor, without tasting it. The principal case, without mentioning that holding, cites *Dane v. State*, 36 Tex. Cr. Rep. 84, 35 S. W. 661 (1896), and *Brown v. State*, 92 Tex. Cr. Rep. 147, 242 S. W. 218 (1922). The *Dane* case would seem contrary to the present case, in that it held that where the record offers no evidence as to the effect of the test upon the verdict by the jury, the court has no data for review. No such evidence of any effect is shown in the present case. In the *Brown* case, where a single juror tasted the liquor and during deliberations, told his fellows that it was intoxicating, such tasting was held prejudicial, and violative of the statute forbidding the jury to hear new evidence in retirement. The decision does not quite reach the case where, as here, each juror tastes the liquor and makes his own deductions.

Where the jury, after retirement, drinks any liquor offered in evidence, it is clearly reversible error. *Galloway v. State*, 42 Tex. Cr. Rep. 380, 57 S. W. 658 (1900). As to tasting in court, the courts of other states are divided, a substantial number allowing the practice. *Troutner v. Commonwealth*, 135 Va. 750, 115 S. E. 693 (1923); *State v. Simmons*, 183 N. C. 684, 110 S. E. 591 (1922), and others. Still others permit smelling and examination, without tasting. *Enyart v. People*, 70 Colo. 362, 201 Pac. 564 (1921); *State v. Olson*, 95 Minn. 104, 103 N. W. 727 (1905). Upon public policy, jurors should not be allowed to taste the liquor because "probably prejudicial, and because . . . not in keeping with an orderly and dignified administration of justice." *Gallagher v. United States*, 299 Fed. 172 (1924), but it is suggested that where such policy is inapplicable, the jury should be allowed to use all of its senses, and therefore that the holdings allowing the jury to smell liquor, without tasting it, represent the better view. "The production of the thing itself would seem the most . . . efficient process of proof. . . . Anything cognizable by the senses of the tribunal may thus be offered." WIGMORE ON EVIDENCE, Secs. 1151, 1152. In *Troutner v. Commonwealth*, *supra*, the jury, in court, smelled and tasted samples from different bottles to determine whether the liquor was of the same run—a

fact upon which guilt of defendant depended. Upholding this, the court said: "In passing upon questions of facts, jurors have the right to use all . . . or such (of their senses) as may be helpful." Otherwise, our fact finders are forced to rely upon testimony from information obtained in that same way. *State v. Simmons, supra*. Through the use of such sense impressions, giving personal knowledge, the facts would always be more certainly determined, affording more assurance of truth and justice. *Gentry v. McGinnis*, 3 Dana (Ky.), 382 (1835). Nor does this make the jurors witnesses in the case. The power of the jury to consider the appearance and demeanor of witnesses, as well as to weigh the value of real evidence introduced, is undisputed. "A thousand and one things may influence them . . . but a knowledge of these things has never been regarded as making them witnesses." If a belief, founded on real evidence presented to them from examination during the progress of the trial, is such private ground of information as to make them witnesses, then any belief based on any class of evidence should have similar effect. *Reed v. Territory*, 1 Okla. Cr. Rep. 481, 98 Pac. 583, 29 Am. St. Rep. 861 (1908).

It is submitted, therefore, that the court, in the instant case, has reached a correct conclusion upon the question of tasting liquor, but that the general ground of the holding, i. e., that the jury should not make free use of sense impressions, seems questionable. It would seem that the work of the jury would be simplified and justice made more certain if the jurors were allowed, where there is no contrary rule of policy or statute, to use all of their senses in open court to secure information helpful in reaching the proper decision. Applying this general rule, it is suggested that the jury, in liquor cases, should be allowed to smell the liquor if, in the discretion of the court, such use of their senses will aid them in reaching a verdict.

R. W. M'D.

CRIMINAL LAW—INDICTMENT—VARIANCE—SUFFICIENCY OF ALLEGATION AS TO THE NAME OF OWNER OF STOLEN PROPERTY.—Zeff was convicted for receiving and concealing stolen property, the indictment alleging "that the property was taken from the possession of one Grubb, whose first name is to the grand jury unknown." The first name of Grubb being disclosed on the trial, the State undertook to prove that the grand jury could not have ascertained his first name by the use of reasonable diligence, but the effect of this evidence was not conclusive. The defendant excepted to the court's refusal to leave this question to the jury. *Held*, that the court should have submitted it to the jury. *Zeff v. State* 273 S. W. 563 (Tex. Cr. App., 1925).

This decision seems questionable on two grounds. First, it holds inferentially that the surname alone is an insufficient allegation of the property owner's name. In this offense, as in larceny, the name of the owner of the property is essential, and must be stated, if known. *State v. Perkins*, 45 Tex. 10 (1876). If the name is unknown to the grand jury, it must be so alleged. *Jorasco v. State*, 6 Tex. Ct. App. 238 (1879); *Grant v. State*, 36 S. W. 264 (Tex. Cr. App., 1896); GREENLEAF ON EVIDENCE, Sec. 22. The purpose of stating the owner's name is to identify the transaction and enable the defendant to prepare his defense. *Brewer v. State*, 18 Tex. Ct. App., 456 (1885); BISHOP'S NEW CRIM. PROC., Vol. 3 (2nd ed.), Secs. 982-983. The cases relied on in the instant case are all cases where the whole name was alleged to be unknown. *State v. Perkins*, 45 Tex. 10 (1876); *Zweig v. State*, 74 Tex. Cr. Rep. 306, 171 S. W. 747 (1913); *Trinkle v. State*, 88 Tex. Cr. Rep. 233, 225 S. W. 754 (1920). In the instant case, the allegation of the owner's surname would seem to be a substantial compliance with the rule and sufficiently certain to inform the defendant of the offense charged. 1 WHARTON'S CR. EVIDENCE (10th ed.), Sec. 95; *State v. Nelson*, 101 Mo. 477, 10 L. R. A. 39 (1890). In fact, some jurisdictions hold it unnecessary to allege the name of the owner at all. *State v. Martin*, 94 Wash. 313, 162 Pac. 356 (1917); *Sandlovich v. State*, 104 Neb. 169, 176 N. W. 81 (1920).

Second, the court requires that the trial court submit to the jury whether the

grand jury knew or could have known the owner's first name. This fact clearly is not involved in the merits of the case, but is simply one of those preliminary facts which falls within the province of the court as any question going to the sufficiency of the pleadings or the admissibility of evidence. If put in issue by a plea of not guilty as held by these cases supporting the principal case, must the state prove the point beyond a reasonable doubt? *Guthrie v. State*, 16 Neb. 667, 21 N. W. 455 (1884); *Williamson v. State*, 13 Tex. Ct. App., 514, 519 (1883); 1 WHARTON'S CRIM. PROC. (10th ed.), Sec. 155. If the jury should find the defendant not guilty because of the so-called variance between allegation and proof, since the verdict is general, could the state meet the plea of former jeopardy under a new indictment? If the facts are clear that the grand jury did know the name of the third party or could have easily found out, the trial court will direct an acquittal, but this will not bar further prosecution. *United States v. Riley*, 74 Fed. 210 (1895); *Duwall v. State*, 63 Ala. 12, 18 (1879). This is the manner in which nearly all the cases on this point have been disposed of. *Duwall v. State*, *supra*; WHARTON'S CR. PLEAD. & PROC. (9th ed.), Sec. 112. If they are not clear, is it any less the court's duty to determine whether the allegation was justified?

In the final analysis, the question is resolved into a sufficiency of the pleading. When facts develop on the trial to indicate the grand jury's error, they in no way bear upon accused's guilt or innocence, but simply suggest a defect in the pleading. The courts speak of such error as a variance. This is not correct. The allegation that the owner's name is unknown is not a material element of the crime charged, but is merely an excuse for not pleading the owner's name. Whether the excuse given was warranted must be determined before it can be known whether the pleading is good. *Was this excuse warranted*, is the real issue involved. If it was, the pleading is good; if not, it is bad. Until this has been determined, the effect of the pleading is not known. But when determined, if the excuse is sustained the trial proceeds; if not the case ends because the grand jury returned an indictment which omits a material allegation for which it has no excuse. When the court determines that the grand jury made a false allegation it declares the effect of the pleading by directing an acquittal. The entire history of the doctrine indicates that this is wholly a function of the court. *Duwall v. State*, *supra*; 1 WHARTON'S CR. PROC. (10th ed.), Sec. 154; *U. S. v. Riley*, *supra*; *Blodget v. State*, 3 Ind. 403. A quashal of the indictment would be more proper except for the fact that it has already been pleaded to. Perhaps such ought to be the procedure in spite of this fact, as it would indicate clearly the effect of the court's ruling.

The Texas cases, *Jorasco v. State*, 6 Tex. Ct. App. 238 (1879), and subsequent cases based thereon, have simply followed and perpetuated a curious dictum expressed in an early Arkansas case, *Cameron v. State*, 13 Ark. 712 (1853), later followed by *Reed v. State*, 16 Ark. 499 (1856), though like expressions are found elsewhere. *State v. Stowe*, 132 Mo. 199, 33 S. W. 799 (1896). But the doctrine of these cases has no legitimate basis and compels an unwarranted surrender of the trial court's power to the jury. It has no place in a rational procedure for it allows an acquittal on a side issue and is but a vestige of the practice of the nisi prius English judges of the early 1800's intended to protect an accused against unfair play when he could neither testify in his own behalf nor have the benefit of counsel. WIGMORE ON EVIDENCE, Sec. 865.

B. L. B.

CRIMINAL PROCEDURE—A CORRECTION OF STENOGRAPHIC ERROR IN STATEMENT OF FACTS NOT PERMITTED.—An error was made in the statement of facts in transcribing the name signed to a forged instrument, making the proof vary from the indictment. *Held*, that correction of a stenographic error in transcribing the statement of facts will not be permitted on appeal, since such statement represents the agreement of both parties, which has been approved by the trial judge. *Hurd*



v. *State*, 269 S. W. 439 (Tex. Cr. App., 1925).

The rule announced has been followed in this jurisdiction both in the criminal and civil appellate courts. *McConnell v. State*, 85 Tex. Cr. App. 409, 212 S. W. 498 (1919), holds that a statement in the judge's charge cannot be looked to as support for evidence missing from the statement of facts. Many ways have been tried to correct such errors, such as ex parte affidavits of the trial judge, district attorney, and court stenographer, *McBride v. State*, 93 Tex. Cr. App. 257, 246 S. W. 394 (1923); the conclusions of fact filed by the trial judge to supplement the statement of facts, *Davis v. John H. Farwell Co.*, 49 S. W. 656 (Tex. Civ. App., 1899); bills of exception showing exact facts of the trial to impeach the statement of facts, *Teel v. Brown*, 185 S. W. 319 (Tex. Civ. App., 1916); written agreement signed by attorney for each party, adding to or contradicting the statement of facts, *Leland v. Chamberlain*, 60 S. W. 969 (Tex. Civ. App., 1901); stenographer's notes duly certified and the correctness of which is admitted by the counsel for each party, *Fort Worth & R. G. Ry. Co. et al. v. Word*, 51 Tex. Civ. App. 206, 111 S. W. 753 (1908). In all such cases relief was denied in substantially the language used in *Edwards v. State*, 262 S. W. 742 (Tex. Cr. App., 1924): "After the statement of facts has been approved and the record made up, we know of no rule of practice that will authorize the parties to the case to add anything to the statement of facts."

However, in *City of San Antonio v. Ashton*, 135 S. W. 757 (Tex. Civ. App., 1911. Writ of error denied), the rule was rejected, Judge Fly saying: "It would be a sad commentary on the powers of the courts of Texas, and a travesty upon justice, if it is conceded that a clerical omission of an important paper on file in the trial court, which was used in evidence and omitted by an oversight from the statement of facts, could not be considered by this court. ELLIOTT ON APPELLATE PROCEDURE, paragraph 548."

Court rules Nos. 8 and 11 for the Courts of Civil Appeals provide ways for correcting errors made in bringing up the record proper, but it was held in *Trans-Pecos Land & Irrigation Co. v. Arno Co-operative Irr. Co.*, 180 S. W. 928 (Tex. Civ. App., 1915), that an error in the statement of facts does not come within these rules; nevertheless it was corrected under a motion based upon an alleged change in the statement of facts after approval by the counsel for appellee. The record other than the statement of facts and bills of exception has been corrected in many instances. *Gonzales v. G. H. & S. A. Ry. Co.*, 107 S. W. 896 (Tex. Civ. App., 1908); *J. M. Radford Grocery Co. et al. v. Owens et al.*, 159 S. W. 453 (Tex. Civ. App., 1913); *Gutheridge et al. v. Gutheridge*, 159 S. W. 452 (Tex. Civ. App., 1913).

Few jurisdictions require a full statement of facts in narrative form agreed to by the parties and approved by the judge in order to bring up the evidence on appeal. Various ways are employed, the matter being regulated by statute in different states: bills of exception, case-made, stenographer's transcript, abstracts of evidence, etc. The line of decisions upon which the principal case is based seem without precedent in other jurisdictions. "Evidence shown to be missing from the case-made may be supplied by the record." *Arnold v. Moss*, 27 Okla. 524, 112 Pac. 995 (1910); *Midland Valley Ry. Co. v. Gibson*, 221 Pac. 100 (Okla., 1923). In conflicts between the bill of exceptions and the stenographer's transcript, the bill of exceptions prevails. *Alexander v. Cincinnati, N. O. & T. P. Ry. Co.*, 260 S. W. 14 (Ky., 1924).

It would seem that any appellate court would have the inherent power to allow such corrections of any part of the record before it as would be necessary to prevent a failure of justice. *Trans-Pecos Land & Irrigation Co. v. Arno Co-operative Irr. Co.*, *supra*. Errors cannot be avoided. The necessity is no greater for correcting them in one part of a record than any other. A procedure that allows no methods of correcting errors as that in the principal case is indefensible. If a rule be required, the Supreme Court under its rule-making power should supply it.

L. F. B.



CRIMINAL PROCEDURE—MOTION FOR NEW TRIAL ALLEGING MISCONDUCT OF JURY—SUFFICIENCY OF AFFIDAVIT.—Defendant, a negro, was convicted of the murder of a white man. He moved for a new trial setting out that while the jury was deliberating, the bodies of a white deputy and his negro slayer were brought into the courtyard some thirty-five feet from the jury room, and that the jury projected their heads out of the window and heard the crowd vociferously denounce the negro killer. Attached to the motion for new trial was the affidavit of the appellant to the effect that such facts were true "to the best of his knowledge and belief." The jurors in the case had been summoned, and were present, ready to testify. The trial court refused the motion on the grounds that the affidavit was insufficient to allow the introduction of testimony. *Held*, that the affidavit was sufficient, and the court should have heard the oral testimony of the jurors in support of the motion. *Means v. State*, 271 S. W. 613 (Tex. Crim. App., 1925).

The case expressly purports to overrule *Calyon v. State*, 76 Tex. Cr. Rep. 83, 174 S. W. 591 (1915), which held that an affidavit by the appellant "to the best of his knowledge and belief" of misconduct by the jury, was insufficient to permit the introduction of oral testimony by jurors in support of a motion for a new trial on such grounds. Art. 753, CODE CRIM. PRO., 1925, provides that "new trials shall be granted, in cases of felony, for the following causes, and for no other: . . . 8. Where, from the misconduct of the jury, the court is of the opinion that the defendant has not received a fair and impartial trial; and it shall be competent to prove such misconduct by the voluntary affidavit of a juror and a verdict may in like manner, in such cases, be sustained by such affidavit." The general rule is that allegations of misconduct on the part of the jury shall be upon positive knowledge of the affiant. *People v. Chin Non*, 146 Cal. 561, 80 Pac. 681 (1905); *Marzen v. People*, 190 Ill. 81, 60 N. E. 102 (1901); *State v. Anderson*, 14 Mont. 541, 37 Pac. 1 (1894); 16 C. I., 1928. Such is also the rule in Texas. *Johnson v. State*, 24 S. W. 94 (Tex. Crim. App., 1893); *Salmon v. State*, 69 Tex. Cr. Rep. 506, 154 S. W. 1026 (1913); *Bryant v. State*, 69 Tex. Cr. Rep. 457, 153 S. W. 1156 (1913). The rule is an obvious necessity in order to give some degree of finality to judgments, and to obviate a needless succession of rehearings. But if the affidavit is sufficient to throw doubt on the fairness of the trial, the court should by all means aid in arriving at the truth. *Hefnarn v. State*, 97 Tex. Cr. Rep. 457, 260 S. W. 198 (1924); *Kannmacher v. State*, 51 Tex. Cr. Rep. 1181, 101 S. W. 238 (1907). Evidently, if under the statute the verdict can be impeached by the voluntary affidavit of a juror, there is no good reason why it should not also be impeached, when the ground is properly laid, by the summoning of the jurors to testify in person. The provisions of the Code of Criminal Procedure shall be liberally construed to obtain its purposes. Art. 23, CODE CRIM. PRO., 1925; *Addison v. State*, 85 Tex. Cr. Rep. 181, 211 S. W. 225 (1919). It may well be contended that the statute does not provide a rule which excludes all testimony except that by affidavit. The testimony of jurors in person, in open court subject to cross examination, is much more conducive to a clear knowledge of the truth than an ex parte affidavit. The instant case properly recognizes the more reasonable rule and brings the practice in criminal cases on this point substantially in line with the practice in civil cases. REV. CIV. ST., 1925, Art. 2234; *Caylat v. H. E. & W. T. Ry. Co.*, 252 S. W. 478 (Tex. Comm. App., 1923).

I. M. W.

EVIDENCE—ADMISSIBILITY OF TESTIMONY OF SUBSEQUENT REPAIRS OR PRECAUTIONS AGAINST INJURY.—In a suit against city for personal injuries suffered on account of negligent maintenance of crossing, there was testimony offered that the defendant repaired the crossing subsequent to the accident. *Held*, that such evidence was material and competent. *Doolin v. City of Winner*, 204 N. W. 899 (S. D., 1925).

It is not stated for what purpose the evidence in this case was introduced. It is practically universal that such evidence may not be introduced for the

purpose of showing negligence. *WIGMORE ON EVIDENCE*, 2nd Ed., Sec. 283; 29 Cyc., 616; *Davidson Co. v. United States*, 142 Fed. 315 (Cir. Ct. App., Eighth Dist., 1905); *City of Cushing v. Bowdlear*, 74 Okla. 138, 177 Pac. 561 (1919); *Mo. Pac. Ry. Co. v. Hennessey*, 75 Tex. 155, 12 S. W. 608, 610 (1889). Contra: *Howard v. Osage City*, 89 Kan. 205, 132 Pac. 187 (1913). The English rule is in accord with the weight of authority in America. *Hart v. Lancashire & Yorkshire Ry.*, 21 Law Times (N. S.), 261 (1869).

But such evidence may become relevant and be admitted on some other issue, although it would have the incidental effect in such instances to show negligence. Such evidence has been allowed for the following purposes: To explain a photograph and prove that a defect could have been remedied, *St. L. A. & T. Ry. Co. v. Johnson*, 78 Tex. 536, 15 S. W. 104 (1890); as rebutting evidence that a bridge was originally constructed in the only possible manner, *S. L. & S. F. Ry. Co. v. George*, 85 Tex. 150, 19 S. W. 1036 (1892); to show condition shortly after the accident, *Richert v. City of Niles*, 205 Ill. App. Ct. Rep. 283 (1918); to show cause of injury, *Tex. & N. O. Ry. Co. v. Anderson*, 61 S. W. 424 (Tex. Civ. App., 1901); to show that city recognized locus as being in a public street, *Benton v. City of St. Louis*, 217 Mo. 687, 118 S. W. 418, 129 Am. St. Rep. 561 (1909); to show appliance practical when it had been alleged to be impractical, *Armour & Co. v. Morgan*, 151 S. W. 861 (Tex. Civ. App., 1912); to prove change in condition practical when it had been alleged impractical, *Tex. Midland Ry. v. Truss*, 186 S. W. 249 (Tex. Civ. App., 1916); to determine whether catastrophe due to improper construction of pier when same kind of materials used in repair as used originally, *Hollenback v. Hand*, 189 Fed. 929 (1911).

The party over whose objection such evidence is admitted, is entitled to have the court restrict its use to the purpose for which admitted. *WIGMORE ON EVIDENCE*, 2nd Ed., Sec. 283. The only materiality of such evidence is that it indicates an admission of the defendant that the condition was in need of repairs. But the danger is that the admission would be given too much weight and unjustly fasten negligence upon the most careful of men in cases when there is no negligence. It should be the policy of the law to encourage, and not to discourage, repairs. This is the chief argument against allowing the evidence admitted in the principal case. *Terre Haute & I. R. Co. v. Clem*, 123 Ind. 15, 23 N. E. 965 (1890). A careful property owner should not be deterred from repairing a non-negligent condition because of fear that he might be furnishing evidence against himself; and a careless property owner should not be encouraged to leave in a state of disrepair a negligent condition inviting recurrence of injury.

W. R. B.

**EVIDENCE—PROOF OF OFFICE CUSTOM SUFFICIENT EVIDENCE OF MAILING LETTERS.**—Action by the beneficiary upon three insurance policies taken out by her husband in the defendant company. The defence is that the checks given by the insured for the premiums were dishonored, and the policies all lapsed for non-payment of premiums, due notice having been given of the dishonor. The plaintiff denies that these notices were among the papers of the deceased. Employees of the defendant company testified that they were sent out in the due course of business, and carbon copies were retained. *Held*, that to constitute competent evidence of delivery, it is not necessary that the identical person who deposited the letters in the mail should so swear from his personal recollection, but evidence that they were mailed according to the custom of the business is sufficient. *Ponder v. Jefferson Standard Life Insurance Co.*, 6 Fed. (2d) 300 (1925).

Due delivery to the addressee is presumed when mailed matter is prepaid, properly addressed, and placed in the appropriate receptacle; *WIGMORE ON EVIDENCE*, 2d Ed., Sec. 95; and the denial of receipt by the addressee does not destroy the presumption, but merely raises an issue of fact. *Wichita Valley Railway Co. v. Davis*, 275 S. W. 169 (Tex. Civ. App., 1925). In Texas and some other jurisdictions fulfillment of these requirements and the subsequent receipt of the letter by the addressee may be presumed upon proper evidence of the habit of

an individual commercial house as to addressing and mailing, and that all letters are sent out through the due course and custom of that business. *Meyers v. Moore-Kile Co.*, 279 Fed. 233 (1922); *Smith v. Heitman*, 44 Tex. Civ. App. 358, 98 S. W. 1074 (1907). This doctrine arose in England as early as 1815. *Hetherington v. Kemp*, 4 Camp. 193.

The orthodox doctrine, at least before the development of modern big business, has been that proof of proper address, stamping, and mailing is required. *Gardam and Son v. Batterson*, 198 N. Y. 175, 91 N. E. 371 (1910); *Federal Asbestos Co. v. Zimmerman*, 171 Wis. 594, 177 N. W. 881 (1920). These holdings are impractical in view of the Universal practice of large business organizations today, under which outgoing letters pass through several hands, in large numbers, rendering recollection of individual letters impossible. Today the doctrine of the principal case, which recognizes as sufficient, evidence that is normally the best that is honestly obtainable, certainly represents the better view.

C. N. C.

**EVIDENCE—RAPE—PLACING PROSECUTRIX ON STAND AS ADMISSESION OF CAPACITY TO CONSENT—FAILURE OF FEMALE TO COMPLAIN.**—The defendant was convicted of rape by force, without consent, upon a female aged 22 years, who was shown by the uncontroverted evidence of lay and medical witnesses to have possessed the mentality of an average child of ten. Her powers of speech were very limited; and her hands and arms were partially paralyzed. She testified, after being adjudged competent, that she offered some resistance upon each of the several occasions of intercourse, but that she understood neither the nature nor the consequences of the act. The fact of intercourse was not disclosed until her pregnancy was discovered by her family. Held, that (1) when the state offered the female as a witness it thereby vouched for her competency to give consent to the intercourse; and (2) that since she was therefore capable of consenting, her failure to complain promptly of the alleged rape was conclusive against the state's case. Reversed and remanded. *Davis v. State*, 272 S. W. 480 (Tex. Cr. App., 1925).

(1) Does the state, when it tenders the prosecutrix as a witness thereby acknowledge her capacity to give or withhold her consent? It is submitted that such should not be held the law of this state. The test for determining competency of a witness is materially different from that governing ability to consent to intercourse. CODE CRIM. PRO., 1925, Art. 708, reads:

All persons are competent to testify in criminal actions except the following:

(1) Insane persons who are in an insane condition of mind at the time they are offered as witnesses, or who were in that condition when the events happened of which they are called to testify;

(2) Children, or other persons, who after being examined by the court, appear not to possess sufficient intellect to relate transactions with respect to which they are interrogated, or who do not understand the obligations of an oath. . . .

It is clear from the first subdivision of this statute that an insane female cannot testify to an act of rape committed upon her. *Lee v. State*, 43 Tex. Cr. Rep. 285, 64 S. W. 1047 (1901). And so in the principal case, by producing the female on the stand, the prosecution does admit that she is not insane then, and was not at the time of the intercourse. Under the second subdivision the state admits only that the female had sufficient intelligence to relate the fact and conditions of the intercourse; that she understood the obligation of an oath; and that she had the capacity of observation, of recollection, and of communication. WIGMORE ON EVIDENCE, 2d Ed., Sec. 492.

The test for competency to consent is totally different. Our statute, PENAL CODE, 1925, Art. 1183, states that to constitute rape the female must have been "so mentally diseased as to have no will to oppose the act." Ability to consent has



been defined, under a statute similar to our own, as "a capacity in the person consenting to understand and appreciate the nature of the act committed, its immoral character, and the probable consequences which may attend it." *People v. Peery*, 26 Cal. App. 143, 146 Pac. 44 (1914). The state, in the principal case, brings the female within the intentment of the statute by showing that she was a mental defective, with the mind, will, and understanding of only a ten-year-old child. She was therefore incapable of giving consent.

The logic of a necessary distinction between the two tests is upheld in *State v. Crouch*, 130 Iowa 478, 107 N. W. 173 (1906); *Weeks v. State*, 126 Md. 223, 94 Atl. 774 (1915); *Adams v. State*, 5 Okla. Cr. Rep. 347, 114 Pac. 347 (1911); *States v. Simes*, 12 Idaho 310, 85 Pac. 914, 9 Ann. Cas. 1216 (1906); RUL. CASE LAW, Vol. 22, page 1228. In the latter it is said that "the fact that the prosecutrix was so weak-minded as to render her incapable of giving an intelligent assent to the violation of her person does not necessarily make her incapable of giving competent testimony concerning the commission of that act; for a female of mature years, and fully developed physically, might be so mentally deranged as not to realize the impropriety of the effect of the illicit act, and yet might be able to give substantially correct and truthful statement of the occurrence and the conditions under which it took place."

In *Thompson v. State*, 33 Tex. Cr. Rep. 472, 26 S. W. 987 (1894), which was strongly relied upon in the case at hand, it was held that under an indictment of "rape by force" and "rape upon a woman so mentally diseased . . . etc.," the tender of the female as a witness worked the virtual abandonment of the last count. The facts there justified the conclusion; for the testimony of the prosecutrix was that she resisted to the utmost, which displayed a "will to oppose the act," and that she knew the nature and probable consequences of it.

(2) On the question of the importance to be attached to the failure of this prosecutrix to complain, the following extract from BRANCH'S ANN. P. C., page 1002, with supporting cases, was cited:

A conviction will not be sustained on the uncorroborated testimony of a woman who waits too long before she announces her decision that she has been raped . . . and where her pregnancy was a motive for her statement. *Price v. State*, 36 Tex. Cr. Rep. 143, 35 S. W. 988 (1896); *Titte v. State*, 38 S. W. 202 (Tex. Cr. App., 1896); *Kennon v. State*, 42 S. W. 376 (Tex. Cr. App., 1897); *Thompson v. State*, 33 Tex. Cr. Rep. 472, 26 S. W. 987 (1894).

It would seem that the court accepted the statement cited above too literally, and that the authorities adducted to sustain it extend the rule only to those cases where the prosecutrix was of admittedly normal mind, or treated so by the court and jury. The inference that a woman in full possession of her faculties, who was forcibly ravished, would immediately make complaint, is a justifiable one. On the other hand, the failure of an insane woman or a child to complain would receive scant attention, since it would be evidence only of a submission or assent to the intercourse, which would constitute no defense. In the twilight zone between these two situations stands the present case. Failure to complain should not be conclusive, but only a circumstance to be considered in determining whether reasonable men could believe from the evidence that the alleged violation had taken place. Failure to complain may be explained away, and in this case the uncontroverted testimony upon the mental state, the limited powers of speech, and the physical debility of the prosecutrix should have been held to overcome any inference which could be drawn from the absence of complaint.

D. C. B.

INSURANCE—INSURABLE INTEREST—TRANSFER OF INTEREST AND OF POLICY.—Pike secured a policy of insurance on a mortgaged building owned by him. The policy contained the standard mortgagee clause, making an independent contract



between the company and the mortgagee, not to be invalidated by certain acts of the mortgagor, but providing that the company should be subrogated to the rights of the mortgagee in cases where the mortgagor could not recover under the policy. Pike assigned his interest in the property to H. S., subject to the mortgage debt, and H. S. placed K. in possession under a bond for title. The insurer duly consented to each transfer. After the building was feloniously destroyed by K., the company paid the mortgagee and claims a right of subrogation against the mortgagor, Pike. *Held*, that Pike had an insurable interest in the property at the time of the loss and (two judges dissenting), that payment to the mortgagee pro tanto extinguished the debt. *Pike v. American Alliance Ins. Co.*, 129 S. E. 53 (Ga., 1925).

When the policy was taken out, Pike's interest, as mortgagor, was of course, insurable. *Carpenter v. Providence Washington Ins. Co.*, 16 Pet. 495, 10 L. Ed. 1044 (1842). Pike remained liable on his note and mortgage even after his conveyance to H. S., but the property was the primary fund out of which the debt was to be satisfied. *Waring v. Loder*, 53 N. Y. 581 (1873). Since Pike would be damnified by a destruction of the property, this would seem to constitute an insurable interest in the property. "It may be stated generally, that any legal or equitable estate, or right which may be prejudicially affected, or any liability which may be brought into operation by a fire, will confer an insurable interest." RICHARDS, INSURANCE, Sec. 25. The tendency of modern cases has been toward extending the limits of insurable interest. But the recent decisions which deny such an interest to a bona fide purchaser of a stolen automobile (*Hessen v. Iowa Mutual Co.*, 195 Iowa 141, 190 N. W. 150 (1922)); or to a buyer who obtains from the seller a bill of sale which does not strictly comply with the Motor Vehicle Law (*Conn. Fire Ins. Co. v. Cox*, 268 S. W. 87 (Mo. 1924)), can scarcely be reconciled with this tendency.

Admitting that Pike had an insurable interest in the property, the question remains whether or not that interest was insured at the time of the fire. Pike apparently had assigned the policy to H. S., and the consent of the insurance company had been secured. It is likely that H. S. paid over to Pike an amount equal to the unearned portion of the premium. There is merit in the argument of the dissenting judges that Pike's interest, whatever it might be, was no longer insured. And a literal construction of the standard mortgagee clause, "whenever this company shall pay the mortgagee, . . . and shall claim that, as to the mortgagor, no liability existed, this company shall be subrogated to all rights," points to such a conclusion. No explanation of the majority view upon this point was given, but the hardship in compelling payment by Pike is apparent.

A. J. E.

INTERNAL REVENUE—INCOME TAX ON INCREASED VALUE OF STOCK ISSUED BY CORPORATION TAKING OVER BUSINESS OF FORMER ONE.—The General Motors Company of New Jersey, organized prior to March 1, 1913, had accumulated from profits a large surplus so that the actual value of the common stock was \$842.50 a share. The corporation had outstanding \$15,000,000 of 7 per cent preferred stock. Its officers organized the General Motors Co. of Delaware at a greatly increased capitalization, and this company made an offer to the stockholders of the New Jersey corporation for the exchange of securities at the rate of five shares of common stock in the Delaware company for one share of common stock in the New Jersey company, and of one and a half shares of preferred stock in the Delaware company for one share of like stock in the New Jersey company. All the stock of the latter company was so exchanged and the corporation dissolved. Marr and wife exchanged common and preferred stock of the old company for which they had paid at par \$76,400.00 for proportionate shares in the new company with a total market value of \$400,866.57. They were taxed upon the difference between these amounts as income. They sued to recover the tax so paid. *Held*, that this difference is taxable as income under the Act of September 8, 1916, Chap. 463, Title I, Secs. 1 and 2, because: (1) the new corporation is essentially

different from the old, being organized under the laws of Delaware and having different rights and powers from the one organized under the laws of New Jersey; (2) a 6 per cent non-voting preferred stock is different from a 7 per cent voting preferred; and (3) the common stock subject to a priority of \$20,000,000 is not the same as common stock subject to a priority of \$15,000,000 preferred stock. *Marr v. The United States*, 69 L. Ed. 683, 45 Sup. Ct. 575 (1925).

The facts in this case present a variation of the question raised in the case of *Eisner v. Macomber*, 252 U. S. 189, 64 L. Ed. 521, 40 Sup. Ct. 189 (1920). That case held that the receipt of a 50 per cent stock dividend by the stockholders of a corporation could not be taxed as income under the Sixteenth Amendment. Although the decision was rendered by a divided court and has been severely criticised, the principle enunciated has not since been questioned by the court. It is to be noticed, however, that the court has construed the rule of that case very narrowly, holding that it is not applicable to cases in which the shares distributed were stock of a new corporate entity even though the new corporation is capitalized out of the assets of the old, and has the same stockholders and directors. *U. S. v. Phellis*, 257 U. S. 156, 66 L. Ed. 180, 42 Sup. Ct. 63 (1921); *Rockefeller v. U. S.*, 257 U. S. 176, 66 L. Ed., 186, 42 Sup. Ct. 68 (1921); *Cullinan v. Walker*, 262 U. S. 134, 67 L. Ed. 906, 43 Sup. Ct. 495 (1923). But it has been held that the creation of a new corporation or the mere change of corporate identity solely for the purpose of reorganization does not render the stock of the new corporation taxable as income of the stockholders. *Weiss v. Stearn*, 265 U. S. 242, 68 L. Ed. 1001, 44 Sup. Ct. 490 (1924). A full discussion of these cases and of the manner in which they are distinguished from the *Macomber Case* is found in I TEXAS LAW REVIEW 363.

The instant case in basing its decision chiefly, if not entirely, upon the change of corporate identity seems distinguishable from the *Weiss Case* only on the ground that the new corporation was organized under the laws of another state, thus adding to the general rule the further qualification that the transaction is always taxable if the new corporation is organized in another state.

All of the cases referred to above, including the instant case, arose under the statutes of 1916, and the present policy of Congress seems to be to wipe out all of the limitations and qualifications fixed by these later cases upon the rule of the *Macomber Case*. Acts of 1921, 42 STAT. AT L., Chap 136, page 230, Sec. 202 (c), (2); Act of June 2, 1924, FED. STAT. ANN., 1924 Supp. 84, Sec. 203 (b). Although they have not been interpreted by the court, the rule under these acts apparently is that no stock dividend is taxable even though the stock issued is stock of a new and separate corporation, or even of a corporation organized under the laws of another state. The language of the Act of 1924, Sec. 203 (b) (2), is as follows: "No gain or loss shall be recognized if stock or securities in a corporation, a party to a reorganization, are in pursuance of the plan of reorganization, exchanged solely for stock or securities in such a corporation or in another corporation a party to the reorganization." Hence it seems clear that the decision in the instant case will not be followed in cases arising under the later statutes.

S. C. H.

PEREMPTORY CHALLENGE—WHEN IT CAN BE EXERCISED.—A member of a special venire was found to be a qualified juror. After being accepted by both the State and defendant, he was sworn individually to sit as a juror in a capital case. Having been instructed as to his conduct he was placed in the sheriff's custody, while the remainder of the jury was being impaneled. The District Attorney asked the court's permission to further examine the juror, stating that he had been informed that questions to the juror had not been answered truthfully. The court granted his request over the objection of the defendant. The bill showed the juror to be neither a perjurer nor disqualified. After the examination the State was permitted to exercise a peremptory challenge and excuse the juror. *Held*, that when juror was impaneled the court had no power to dismiss

him without the consent of the accused. Rehearing denied. *Carrasco v. State*, 274 S. W. 155 (Tex. Cr. App., 1925).

Many jurisdictions hold that a reversal will be given only in the event that the peremptory challenge to an accepted juror has prejudiced the trial of the accused. *Stevens v. Union Ry. Co.*, 26 R. I. 90, 58 Atl. 492, 66 L. R. A. 465 (R. I. Sup. Ct., 1905). In Texas as a general rule of appellate procedure a reversal will not be given unless the law is infringed or the defendant prejudiced. *Wade v. State*, 12 Tex. Ct. App. 358 (1882). However, the mere excusing of an accepted juror has been held to be reversible error, where he had been excused with the consent of the State and defendant's attorney, but without the consent of the accused himself. *Sterling v. State*, 15 Tex. Ct. App. 249 (1883). This difficulty can be solved by discharging the entire jury and impaneling a new one. *Crow v. State*, 89 Tex. Cr. Rep. 149, 230 S. W. 143 (1921), for a conviction in such a case has been upheld in *Steen v. State*, 92 Tex. Cr. Rep. 99, 242 S. W. 1047 (1922). Construing PASCHAL'S DIGEST, Art. 3024, now CODE CRIM. PRO. 1925, Art. 613, there is no law for allowing a peremptory challenge after a juror has been placed on the jury, whether the jury be completed or not. *Horbach v. State*, 43 Tex. 242 (1875). Accord: *Baker v. State*, 3 Tex. Ct. App. 525 (1878), recognizing diversities in different States owing to variant statutory construction; but *semble* cause might arise where such challenge should be allowed on account of something arising subsequent to time ordinarily given for peremptory challenge or undiscoverable on *voir dire*.

Texas follows the general rule, that in both criminal and civil matters the peremptory challenge must be made before the juror is sworn, *McDonald v. State*, 172 Ind. 393, 19 Ann. Cas. 763 (1909); while New York, having a statute similar to Texas, supports the general rule deciding that the statute is mandatory, not directory in this respect, and to permit it would be in contravention of the principle for which the peremptory challenge was founded, namely, tenderness to accused persons. *People v. McQuade*, 110 N. Y. 284, 18 N. E. 156, 1 L. R. A. 273 (New York Ct. of App., 1888). Accord: *Stalls v. State*, 28 Ala. 25 (1856).

The modified view leaves this matter to the discretion of the trial court, but holds that the peremptory challenge cannot be exercised arbitrarily after the juror has been sworn. *Comeford v. Moorwood*, 34 N. Dak. 276, 158 N. W. 258 (1916). THOMPSON ON TRIALS, 2nd Ed., Sec. 120. Arkansas, while following this view as an interpretation of the statute lays great stress on the fact that good cause must be shown why the juror should be peremptorily challenged after being sworn and accepted. *Williams v. State*, 63 Ark. 527, 39 S. W. 709 (1897); *Allen v. State*, 70 Ark. 22, 68 S. W. 28 (1902); *Brust v. State*, 153 Ark. 348, 240 S. W. 1079 (1922). Accord: *Colvin v. Commonwealth*, 22 Ky. Law Rep. 1407, 60 S. W. 701 (1901), distinguishing the peremptory challenge allowed for good cause, though tardily made, from a challenge for cause. Good cause under the modified view seems to be shown when the appellant has concluded that the juror is not acceptable. He need not state reasons. *Jones v. State*, 265 S. W. 974 (Sup. Ct. Ark., 1924).

C. S. E.

PROCEDURE—CERTIFICATION TO SUPREME COURT BY COURT OF CIVIL APPEALS—CONFLICT WITH OPINION OF COURT OF APPEALS NOT WITHIN STATUTE.—Roddy moved for leave to file a petition for mandamus against the justices of the Court of Civil Appeals for Fourth District, alleging a conflict between the decision of that court with the case of *Miles v. Mays*, 4 Willson Civ. Cas. Ct. App., Sec. 110, 16 S. W. 540 (1890), decided by the old Court of Appeals which functioned until 1891. Held, that a court of Civil Appeals is required to certify questions to the Supreme Court only when its decision conflicts with an opinion of the Supreme Court or of another Court of Civil Appeals. The conflict alleged was not such a conflict. Leave to file the petition for mandamus refused. *Roddy v. Fly*, 272 S. W. 437 (Tex. Sup. Ct., 1925).



The original statute provided for certification only when a decision of a Court of Civil Appeals conflicted with that "of some other Court of Civil Appeals in this State on any question of law." GENERAL LAWS OF TEXAS, 26th Leg., 1899, p. 170, c. 48; Article 1623, REV. CIV. ST., 1911. A conflict with a decision of the Supreme Court did not compel the Court of Civil Appeals to certify the question. *Smith v. Connor*, 98 Tex. 434, 84 S. W. 815 (1905); *Warren v. Willson*, 108 Tex. 262, 192 S. W. 529 (1917). Cases in which a Court of Civil Appeals had merely followed the holding of the Supreme Court in answer to certified questions were regarded as decisions of the Supreme Court. *T. & P. Ry. Co. v. Willson*, 101 Tex. 269, 106 S. W. 325 (1908). A conflict between decisions of the same Court of Civil Appeals did not come within the statute. *Coultriss v. City of San Antonio*, 108 Tex. 150, 187 S. W. 194 (1916).

In 1923 the Legislature amended this article to include conflicts with an "opinion theretofore rendered by the Supreme Court of Texas." GENERAL LAWS OF TEXAS, 38th Leg., 1923, p. 94, c. 48; Article 1855 R. S., 1925. The law imposes no duty upon a Court of Civil Appeals to certify questions arising under one of its opinions which may be variant from its opinion in another case or from an opinion of the Commission of Appeals. An opinion of the Commission is defined as one where only the judgment that was recommended was adopted by the Supreme Court. *American National Bank of Wichita Falls v. Hall*, 265 S. W. 378 (Tex. Comm. App., 1924). *Cossett v. Citizens Ry. Co.*, 96 Tex. 1, 69 S. W. 976 (1902), decided the identical point here involved under the terms of the original statute and was followed by the court in the principal case, the amendment having in no way affected such holding.

H. G.

**TORTS—LIABILITY OF COUNTY HIGHWAY OFFICERS FOR DEFECTS IN HIGHWAYS.**—County highway officers in repairing a road removed a bridge, leaving a dangerous chasm open over night without erecting warnings. Plaintiff was injured by driving into the chasm. *Held*, that the officers were liable for the injuries though the county was not liable. *Vance v. Shelby County*, 273 S. W. 557 (Tenn., 1924).

At common law road commissioners are personally liable for the consequences of their own negligence, *Embler v. Walkkill*, 57 Hun. 384 (1890), and not the township or county. *Heigel v. Wichita County*, 84 Tex. 392, 19 S. W. 562, 31 Am. St. Rep. 63 (1892); *COOLEY, CONST. LIM.*, 247. *Contra: Anne Arundel County v. Watts*, 112 Md. 353, 76 Atl. 82 (1910). A city is liable for negligence in failing to keep its streets in repair, *City of Galveston v. Posnaisky*, 62 Tex. 118 (1884), but a county is a subordinate political division of the State and the State cannot be sued without its consent. The liability of a public officer to an individual for his negligent acts or omissions in the discharge of an official duty depends upon the nature of the duty as to which the neglect is alleged. *SHEARMAN AND REDFIELD ON THE LAW OF NEGLIGENCE*, 3d Ed., Sec. 156. Where his duty is absolute, certain and imperative, in other words is simply ministerial, he is liable in damages to anyone specially injured either by his omission to perform the task or by his negligent performance. *Smith v. Zimmer*, 45 Mont. 282, 125 Pac. 420 (1912); *Doeg v. Cook*, 126 Cal. 213, 58 Pac. 707, 77 Am. St. Rep. 171 (1899). Where his powers are discretionary he is not liable for negligence in their exercise, *Worsham v. Votsberger*, 129 S. W. 157 (Tex. Civ. App., 1910), but the mere fact that an officer is clothed with discretion in the method of performing his work will not render his acts judicial. *McCord v. High*, 24 Iowa 336 (1868). The principal case involves affirmative misconduct after entering upon the repair of the highway. In such cases liability is generally imposed. *Mott v. Hull*, 51 Okla. 602, 152 Pac. 92, L. R. A. 1916B, 1184 (1915); *Robinson v. Rohr*, 73 Wis. 436, 2 L. R. A. 355 (1888); *Stevens v. North States Motor, Inc.*, 201 N. W. 435 (Minn., 1925). In some jurisdictions it is held that the duty arises merely by the acceptance of the office, and the non-performance or negligent performance of such duties imposed by the office renders the officer liable. *Strong v. Day*, 61 Okla. 166, 160 Pac. 722, L. R. A. 1917B, 369 (1916); *Hale v. Johnston*, 140 Tenn. 182,



203 S. W. 949 (1919); *Deog v. Cook*, *supra*. Other jurisdictions hold that the duties imposed are public duties, *Richardson v. Belknap*, 213 Pac. 335 (Colo., 1923), and that their breach must be redressed by a public prosecution, if at all; COOLEY ON TORTS, p. 379; that to hold otherwise would work a practical abolition of the office, as no one would assume its duties. *Worden v. Witt*, 4 Idaho 404, 39 Pac. 1114 (1895); *Richardson v. Belknap*, *supra*.

An early Texas case held that road overseers who were compelled to accept the office when appointed were only liable for the penalty imposed by statute for any mere omission of duty. *Thornton v. Springer*, 5 Tex. 587 (1851). But in other States the fact that a road supervisor is subject to a penalty does not relieve him from liability for a breach of ministerial duty in keeping the road in repair. *Sells v. Dermody*, 114 Iowa 344, 86 N. W. 325 (1901); *Smith v. Zimmer*, *supra*. In any event the decision in the Texas case would not militate against holding the officer liable for affirmative misconduct. And it would seem that Art. 6738, REV. CIV. STAT., 1925, which provides that a road commissioner shall see that all roads and bridges are kept in good repair, is broad enough to support a cause of action either for nonfeasance or misfeasance in the performance of the duties of his office.

J. E.

WATER AND WATERCOURSES—WHAT CONSTITUTES A WATERCOURSE.—The defendant undertook to construct a dam and irrigation ditches for the purpose of diverting all of the water from the channel of a creek which passed through his land and thence through land belonging to the plaintiff. The creek, having well defined channel, bed and banks, was fed by rain water, falling within its watershed at intervals of from one to twenty-two times annually, the flow of water continuing on an average of one or two days after each rain. The plaintiff seeks an injunction for the purpose of restraining defendant from constructing the dam in such a manner as to prevent water in excess of a stated quantity, to which it is conceded the defendant is entitled, from passing down the channel to the dam and ditches of the plaintiff. *Held*, that waters flowing within a well defined channel, with well defined bed and banks, with such volume and persistency after rains as to be useful for irrigation purposes, are not surface waters, but are waters of a stream, to which water rights, whether riparian or by appropriation, enforceable in equity, attach. *Hoefs v. Short*, 273 S. W. 785 (Sup. Ct. Tex. 1925).

To constitute a watercourse, or stream, the water must flow in a well defined bed, with well defined banks. *Hutchinson v. Watson Slough Ditch Co.*, 16 Idaho 484, 101 Pac. 1059, 133 Am. St. Rep. 125 (1909); *Wilborn v. Terry*, 161 S. W. 33 (Tex. Civ. App., 1913); *Town v. Missouri Pac. Ry. Co.*, 50 Neb. 768, 70 N. W. 402 (1897); KINNEY ON IRRIGATION, Sec. 301. There must be a permanent source of water supply, in the sense that similar causal conditions will always produce a flow of water with some reasonable degree of regularity. *Brown v. Schneider*, 81 Kan. 486, 106 Pac. 41, 135 Am. St. Rep. 396 (1910); KINNEY ON IRRIGATION, Sec. 306. Although there is an apparent conflict in the authorities as to whether or not ordinary, intermittent rainfall is an adequately permanent source, TIFFANY ON REAL PROPERTY, Sec. 339, it is well settled that surface water which is caused by rainfall over a large area, and has flowed persistently in a well defined channel, becomes a watercourse. THOMPSON ON REAL PROPERTY, Sec. 557; *Brown v. Schneider*, *supra*; *Gramman v. Eicholtz*, 36 Tex. Civ. App. 309, 81 S. W. 756 (1904). It is equally well settled that the flow of water need not be constant and continuous. *Spink v. Corning*, 61 App. Div. 84, 70 N. Y. Supp. 143 (1901); *Case v. Hoffman*, 84 Wis. 438, 54 N. W. 793, 36 Am. St. Rep. 937, 20 L. R. A. 40 (1893). TIFFANY ON REAL PROPERTY, Sec. 339.

Inasmuch as the holding in the principal case was based on a comparatively strong set of facts arising in a semi-arid section of the State, where settlement of questions relating to irrigation rights upon reasonably adapted principles is of great importance, the soundness of the court's application of the well established common law rules pertaining to water rights would seem not to admit of question.

C. W. B.

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## SOME PHASES OF THE TEXAS ANTI-TRUST LAW

### PART II\*

Part I of this article dealt with the effect of the Anti-Trust Law of Texas on covenants in restraint of trade and competition accompanying (1) the sale of a going business; (2) contracts of employment; (3) the sale of property. It was found from the cases considered that the chief reliance of the court in determining the lawfulness or unlawfulness of a transaction was upon the word "combination" as used in the statute and that ordinarily a covenant in restraint of trade if imposed by but one person, whether individual, partnership or corporation, was valid. But while the "combination" test seems not to have been definitely abrogated in any of the cases considered in the sections making up the first part of this article, it was overlooked or ignored in some of them where the decision might have fairly been placed on that ground.<sup>71</sup>

It is therefore without much assurance of the results to be reached under the statute that we turn to a very different, and, from the standpoint of litigation, the most important, line of cases on restraint of trade and competition,—those concerning the relations between manufacturer, wholesaler and retailer.

#### 4. CONTRACTS ACCOMPANYING THE SALE OF GOODS TO BE RESOLD.

A word by way of comparison with cases considered in the third section of this article may not be out of place here in order to indicate what the present section is and what it is not. It was pointed

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\*Continued from 3 TEXAS LAW REVIEW 335 (June, 1925). It is suggested that the reader who desires to make more than a superficial examination of the subject have a copy of the first part of the article before him as occasional reference will be made to it herein.

<sup>71</sup>The Railway Cases, 3 TEXAS LAW REVIEW 353 ff.

out that the cases in that section usually arose out of a sale of real property.<sup>72</sup> But that was not a necessary feature of those cases. A ship line selling one of its steamers might properly require the buyer not to use that purchase in competition with the seller;<sup>73</sup> so presumably might the seller of cotton-ginning machinery, for example;<sup>74</sup> but the similarity of these to cases of real property sold or leased with like restrictions is that they deal with a sale of plant or permanent facilities and not a stock of merchandise. The former, while they are the subject of resale if the buyer chooses to sell them, are not by their very nature intended for resale, as is the latter. The restrictions therefore normally imposed on buyers of premises, plant and equipment are against the use of those purchases in a way injurious to the seller; the restrictions on buyers of a stock of goods are on its resale.

Having indicated the differences we will now notice the similarities. The seller of a steamer in the case above cited demanded for his own benefit that the buyer do not put his purchase into competitive service, but he might also have made that demand for the benefit of his successors in the shipping business, a restriction which is, after all, for his own benefit since thereby his chances for selling his own business are increased.<sup>75</sup> Correspondingly, a manufacturer of hats, for example, sells them to a wholesaler with the requirement that the latter do not resell them outside certain assigned territory either because the manufacturer may wish himself to job the surrounding territory—or, what is more likely, he has a representative there whose business he wants to protect,—which on analysis proves out to the same end since the reason he wants his second representative protected is to increase his sales to the latter.<sup>76</sup>

Nothing is more natural, therefore, than for the manufacturer of merchandise to desire to impose restrictions on his buyer. And since

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<sup>72</sup>3 TEXAS LAW REVIEW 349 ff.

<sup>73</sup>*Oregon Steam Nav. Co. v. Winsor*, 20 Wall. 64, 22 L. Ed. 315 (1873).

<sup>74</sup>But compare *Henschke v. Moore*, 257 Pa. 196, 101 Atl. 308 (1917), involving unreasonable restrictions on the use of certain horsehair machinery. See discussion of the "Pump and Tank Cases" at the end of note 96, *post*.

<sup>75</sup>Compare *Langever Case*, note 17, *supra*, wherein the covenant of the seller of a business was made effective in the hands of an assignee.

<sup>76</sup>The objection here might be raised that since the manufacturer, M, is interested only in his own total sales, he should not object if salesman A, of County X, sells in County Y, assigned to salesman B. The demand will be met in either instance by a supply of the same manufacturer's products. The answer to this is obtainable from any manufacturer. The encroachments of A onto B's territory may discourage B so that he will not press the M line, and the actual sales by M will fall off.



the manufacturer has the absolute right of ownership of his products and can sell or not as he pleases, the argument is sometimes heard that he may sell on any terms that he sees fit to make. But "absolute rights" are a mythical notion in this connection as in most others. A promise to sell and deliver hats on condition that the buyer commit a murder would be unlawful despite the fact that the owner was under no obligation to sell to anyone and hence could determine in his own mind to sell to no person except one guilty of that crime. But it will be said, that such a condition has no relation to the subject matter of the sale and is void, and that one owning property absolutely ought to be able to sell his entire ownership ("sell the property," as it is usually stated) or sell any portion of such ownership, as, for example, in the case of real estate, to convey a life estate without the right to cut down trees, or, returning to an example above mentioned, to transfer title to a boat subject to its not being used at the port from which it was sold.<sup>77</sup> As a matter of abstract logic that is true. One ought to be able to divide up the various incidents of ownership and sell off few or many in the same way that one divides up the land or chattel itself into lots or parcels to sell. Yet as a matter of policy and not logic the law has said this sometimes cannot be done. The man who can sell all but one square foot of a quarter section of land cannot sell the whole quarter section permanently minus the power of alienation.

Returning from this digression, we observe that the common law did uphold the seller of a boat in one restriction for a limited time on its use while it might not have upheld him in other restrictions such as those prohibiting its lease or resale. The same logical problems would arise in relation to the sale of toy boats constituting a stock in trade, but the policy might be different. Could toys be sold on condition that no resale be made for 10 years? Could sugar be sold to a candy factory on condition that it be not resold at all but be used in the factory? The unusual economic conditions of war time seem to have created a policy in the federal courts favorable to the latter.<sup>78</sup> With these observations on the general state of the

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<sup>77</sup>*Oregon Steam Nav. Co. v. Winsor*, note 71, *supra*. It makes no difference whether the buyer is said to get an absolute title to the boat or not. Absolute ownership usually includes the privilege of use wherever the owner chooses. A person who owns outright a boat which he cannot use in business on San Francisco Bay, does not in any practical or logical sense have all the normal incidents of such ownership.

<sup>78</sup>*See Continental Candy Corp. v. Cal. & Hawaiian Sugar Ref. Co.*, 270 Fed. 302 (N. D. Cal., 1920); affirmed, *Fosburgh v. Cal. & Hawaiian Sugar Ref. Co.*, 291 Fed 29 (C. C. A., 9, 1923). A like provision was contained in the



law to serve as background we turn then to inquire what is the normal policy of the Texas law with regard to restrictive contracts accompanying the sale of goods? The source of that policy is of course the anti-trust statute as interpreted by the courts. It will be recalled that the statutory prohibition is against "trusts" and that by definition "a 'trust' is a combination of capital, skill or acts by two or more persons. . . . 1. To create, or which may tend to create or carry out, restrictions in trade or commerce or aids to commerce. . . . 3. To prevent or lessen competition in . . . sale or purchase of merchandise. . . ." <sup>79</sup> It will also be recalled that there was both some reason and authority for regarding a contract restraining one of the contracting parties from competition with the other as a combination,<sup>80</sup> but that the decision in *Gates v. Hooper*<sup>81</sup> settled that it was not where it was made in favor of but one party and as collateral to the sale of a business. Granting that, the writer has been unable to discover how there exists any more a combination in a restraining covenant in favor of but one party and as collateral to the sale of a stock of goods, as, for example, an agreement accompanying the sale of a line of Stetson hats, which restrains the Stetson Company from selling to other dealers in the same community. There may be some reason why the latter restraint is more injurious to the public welfare than the former,<sup>82</sup> but the

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contract of the Coca-Cola Co. with its licensees. See *Coca-Cola Co. v. State*, note 110, *post*. Compare also *Crystal Ice Mfg. Co. v. San Ant. Bwg. Assn.*, 27 S. W. 210 (Tex. Civ. App., 1894), which, on common law principles, decided that the ice company could sell ice to the brewery on condition that it be used by the brewery and not resold. The court regarded this arrangement as neither in restraint of trade nor preventive of competition because it did not appear that the brewery dealt in ice or had any intention to do so. Of course, if the brewery did not ever decide to sell ice the restraint would be superfluous; while if it did decide to do so (as in fact it did) the agreement not to sell would restrain such sale or trade. It is another question, however, whether the agreement or condition was valid because, as declared by the court, it was not unreasonable, pernicious or detrimental to the public. The Anti-Trust Act of 1889 (see note 10, *supra*) was in force at the time of this contract and it should have been urged on the court.

<sup>79</sup>See note 20, *supra*, also the earlier statute quoted in note 10.

<sup>80</sup>Dictum of Justice Gaines in *Queen Insurance Case*, note 11, *supra*.

<sup>81</sup>Note 7, *supra*.

<sup>82</sup>Although it was not so considered prior to the Anti-Trust Act in Texas. See *Watkins v. Morley & Co.*, 2 Willson, Ct. of App. Civ. Cases. 634 (§723) (1885), wherein the agent of Morley & Co., Ohio chinaware manufacturers, agreed with Watkins, a retail merchant who bought a bill of Morley's ware, that no other such goods should be sold to dealers in the same town, and if they were, "then Watkins need not pay for the goods ordered by him." The court upheld the contract as not in unreasonable restraint of trade. It also declared that the agent had apparent authority to make the promise to give away his employer's goods on the condition stipulated. If the decision were

difficulty is in finding any evidence of such a legislative declaration in the statute.<sup>83</sup> Exactly the same thing can be said of an agreement by the buyer of such merchandise that he will not resell it outside of territory assigned to him as his sphere of operation. And yet from the very first, and even before the decision in *Gates v. Hooper*, the courts have purported to find in the statute a denunciation of such contracts as combinations. The only basis for such a holding in the face of the cases cited in the first three sections of this article, would seem to be that these merchandise restraint contracts contemplate a series of transactions more or less interdependent. The hat manufacturer will supply further hats as per contract if the retailer has not sold beyond his bailiwick; or, the dealer will buy more hats if his competitor has not been supplied. The trouble with this explanation is that the courts have neither used nor followed it; it does not explain. The courts are seemingly as ready to invalidate a resale restraint where there has been but one sale as they are where there are a series of sales, or a contract calling for them.<sup>84</sup> Whether rightly or wrongly they treat them all as combinations to carry out restrictions

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as bad on the restraint of trade issue as it is on apparent authority of agents, one would not care to place much reliance on it,—but on the former it is probably sound. Accord, *Clark v. Crosby*, 37 Vt. 188 (1864); *Roller v. Ott*, 14 Kan. 609 (1875); *Ewing v. Wilcox & Gibbs*, 9 Wkly. Notes (Pa., 1880); *Keith v. Hirschberg Optical Co.*, 48 Ark. 138, 2 S. W. 777 (1887); *Newell v. Meyendorff*, 9 Mont. 254, 23 Pac. 333 (1890); and so, too, of corresponding agreements by the merchant to buy exclusively from one source: *Brown v. Rounsavell*, 78 Ill. 589 (1875); *Weiboldt v. Standard Fashion Co.*, 80 Ill. App. 67 (1898),—probably assigning a wrong reason by treating the contract as one of agency. Accord also under anti-trust statutes, though without reasoning: *W. T. Rawleigh Med. Co. v. Osborne*, 158 N. W. 566 (Iowa, 1916); *Peerless Pattern Co. v. Gauntlett Dry Gds. Co.*, 171 Mich. 158, 136 N. W. 1113 (1912),—statute very similar to that in Texas,—*Comp. L. Mich.*, 1915, §15013. Compare decisions to the contrary but easily explainable on special facts present, as, e. g., monopoly element, *Crawford & Murray v. Wick*, 18 Ohio St. 190 (1868); *Whitridge v. Mt. Vernon Woodberry Cotton Duck Co.*, 210 Fed. 302 (Dist. Md., 1913).

<sup>83</sup>It may be that the 5th section of the statute in its more recent form was intended to take care of such a case (see note 20, *supra*), since, by the punctuation thereof, the words "at a price below a common standard or figure" are attached to contracts of insurance only. But in view of the remaining clauses such a construction is dubious. The whole section seems to relate to price control. The same comment applies to the clause "to preclude a free and unrestricted competition among themselves or others in the sale . . . of any such article," which is lost in a maze of other words, phrases and clauses further along in the same section. At any rate the decisions to be reviewed herein, and which established the rules pertaining to such contracts were not placed upon this section. And furthermore the section in its clearer, original form (see note 10, *supra*, "fifth") was not susceptible of any such construction.

<sup>84</sup>Plainly indicated in the *Albertype Case*, note 101, *post*, where the contract was nevertheless upheld on other grounds.

in trade. Nevertheless, whatever irregularities there are in the foundations of this doctrine, there has been reared above it a fairly symmetrical superstructure.

First of all, the prohibition was held in one early case<sup>85</sup> not to relate to a contract between a principal and his agent (and the test of agency was held to be whether title to the goods passed to the Texas representative or not);<sup>86</sup> hence the manufacturer of windmills was permitted—1. to limit sales by his agent to certain territory—2. to fix the prices at which the agent should sell and—3. to require that the agent sell no competing line. When it is considered that sales by the agent are not resales but in fact sales by the principal through the medium of an agent<sup>87</sup> little fault can be found with the decision as to the first two restrictions named. They represent only the principal's determination to sell his own goods from a certain headquarters and at his own prices. They restrain the agent's trade no more than I restrain a jeweler's trade by refusing to let him sell my watch. He has no interest in the property, only a hope of making profits by performing a service for the owner. The third restriction, however, cannot be so convincingly sustained. It restrains the agent not in the manner of performing his principal's business, but about his

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<sup>85</sup>*Welch v. Phelps & Biglow Windmill Co.*, 89 Tex. 653, 36 S. W. 71 (1896).

<sup>86</sup>The question of whether a given contract is one of sale or agency and the application of the test is a matter of the law of sales. The difficulties may be appreciated by comparing two hypothetical cases, (1) where a principal who owns goods gives an agent the power of sale and requires him forthwith on sale to remit the proceeds after deducting his commission and, (2) where a manufacturer sells to a dealer on time, transferring beneficial ownership but retaining title in himself for security, and requires that on sale the purchase price be forthwith paid out of the money collected. See *Mansur & Tibbetts Implement Co. v. Price*, 22 Tex. Civ. App. 616, 55 S. W. 764 (1900), and *MECHEM, AGENCY*, 2 Ed., §§47-48. If in the latter type of case resale price were fixed the two transactions would appear identical to the ultimate purchaser. On this difficulty, the writer has consulted his colleague, Prof. A. C. Brightman, who believes that the most satisfactory test of a sale as distinguished from an agency is the presence in the contract of something which binds the so-called agent ultimately to complete his title and become the absolute owner of the goods. Compare also the following cases: *Williams v. Drummond Tobacco Co.*, 44 S. W. 185 (Tex. Civ. App., 1897), held *sale*; *Columbia Carriage Co. v. Hatch*, 47 S. W. 289 (Tex. Civ. App., 1898), held *sale*, not *agency*, although dealer was to pay principal with customers' notes indorsed by him; *Am. Bwg. Assn. v. Woods*, 215 S. W. 448 (Tex. Comm. App., 1919), held *sale*; *La Fon v. Falls Rubber Co.*, 242 S. W. 346 (Tex. Civ. App., 1922), held *agency*; *McConnon v. Powell*, 248 S. W. 428 (Tex. Civ. App., 1923), held *agency*; *Dickerson v. McConnon & Co.*, 248 S. W. 1084 (Tex. Civ. App., 1923), presumably same kind of contract but alleged to be one of *sale* and admitted by demurrer; *Cole Motor Car Co. v. Hurst*, 228 Fed. 280 (C. C. A., 1915), held consignment contract, hence *agency*; *Kissel Motor Car Co. v. Walker*, 270 Fed. 492 (C. C. A., 1921), *sale*.

<sup>87</sup>*La Fon v. Falls Rubber Co.*, note 85, *supra*.



independent activities and so, it seems, is as much of a combination as a like agreement to restrain the sales of an independent dealer. He cannot under this agreement buy and sell competitor's windmills. The reason for sustaining such an agreement is, of course, founded on the law of agency that the principal may expect and require faithful and undivided allegiance; and on practical business reasons the anti-trust law ought not to thwart a wholesome doctrine of agency law. If the result is satisfactory, it may then be asked, why raise technical objections to it? The answer is that it is desired to show that the courts are led by their sound sense to apply a rule of reason even when it is their declared policy not to do so, and again to observe in passing the practical difficulties of drawing a statute which will at once allow the conduct of proper business unhampered and yet checkmate the efforts of those who would do things which are publicly harmful. It being then settled that restraints on the agent are lawful, are restraints on the principal as for instance that he shall permit no other agent to sell in the assigned territory? This restriction, too, was held valid in the *Windmill Case*.<sup>88</sup> The attitude of the courts is apparently to take their hands off of the principal and agent relation and leave it outside the scope of the anti-trust law.<sup>89</sup>

On the proposition that restraining contracts between manufacturer and dealer other than an agent are void, the facts and decision of a leading case will be stated.

In *Texas Brewing Co. v. Templeman*,<sup>90</sup> the brewery contracted to sell beer and ice exclusively to the firm of Norwood & Co. in the town of Navasota, Grimes County, and exacted in return the promise that the dealer would handle no other beer. Defendants were sureties for the dealer and the question was the validity of the contract in view of the restrictions mentioned. The court in an opinion by Gaines, C. J., indicated that no agency relation was created notwithstanding the use of the word "representation" in the contract,<sup>91</sup> since by its other terms a purchase and sale transaction was clearly evidenced. It quoted from the Act of 1889<sup>92</sup> and after referring to additional pro-

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<sup>88</sup>The promise was, "to give to the second party the exclusive right to sell in certain territory for one year."

<sup>89</sup>Accord, agency cases cited in note 86, *supra*.

<sup>90</sup>90 Tex. 277, 38 S. W. 27 (1896).

<sup>91</sup>The Court of Civil Appeals had also referred to it as giving "the sole agency." *Templeman v. Tex. Bwg. Assn.*, 35 S. W. 935 (Tex. Civ. App., 1896). The contract in *Standard Fashion Co. v. Magrane Houston Co.*, note 106, *post*, was held by the Supreme Court of the United States to be one of sale although it was purposely worded in terms of agency.

<sup>92</sup>Note 10, *supra*.



visions of the contract whereby the brewing company obligated itself to furnish the dealer with a delivery wagon and also a storage vault for ice, on floor space to be provided by the latter, declared, "Here is a union of the capital of both parties and the skill of one of them. The contract itself and what was done under it are acts of combination."<sup>93</sup> Since the objects were patently to restrain competition, the case against the contract was clinched by this finding that a combination existed, and on this ground a judgment of the Court of Civil Appeals in favor of defendant sureties was affirmed although that judgment had been rendered on reasons outside the question of restraint of trade.<sup>94</sup> That, in the *Templeman Case*, nothing turned on the furnishing of a wagon and ice chest, although the court referred to those facts as being of significance, is sufficiently shown by subsequent cases wherein exclusive territory, exclusive representation arrangements without more were struck down on the authority of the *Templeman* decision. In *Texas Brewing Co. v. Meyer*,<sup>95</sup> for example, decided by the Court of Civil Appeals only nine days later, the rule of the *Templeman Case* was followed and applied to a case where the dealer at Sealy, Texas, was bound to handle no other brand of beer and to give prompt notice of any competition which should show its head in that town. No other evidences of combination appear to have been present,—at least none were relied on in the opinion.

The rule of the *Templeman Case* is still the law. It has been followed in a host of "me too" decisions which present no distinction warranting detailed examination in the text and will be summarized in the footnotes.<sup>96</sup> There have been variations of it, however, which are of interest.

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<sup>93</sup>Compare with the language quoted from the Queen Insurance Case, *ante*, in Section 1 of this article (3 TEXAS LAW REVIEW, at p. 339).

<sup>94</sup>Note 91, *supra*,—on the ground that the time for payment by the principal debtor had been extended.

<sup>95</sup>38 S. W. 263 (1896).

<sup>96</sup>Accord, *Tex. Brewing Co. v. Anderson*, 40 S. W. 737 (Tex. Civ. App., 1897), exclusive purchase and sale; *Tex. Bwg. Co. v. Durrum*, 46 S. W. 880 (Tex. Civ. App., 1898), same; *Waters-Pierce Oil Co. v. State*, note 102, *post*, agreement to purchase exclusively from defendant and not to resell to those who handled competitor's oils; *Mansur & Tibbetts Impl. Co. v. Price*, note 86, *supra*, buyer's agreement to handle no competing goods; *Crystal Ice & Mfg. Co. v. State*, 56 S. W. 562 (Tex. Civ. App., 1900), manufacturer's agreement with dealer not to sell directly to public,—additional factor of monopolistic combination; *Star Mill & Elevator Co. v. Ft. Worth Grain & Elevator Co.*, 146 S. W. 604 (Tex. Civ. App., 1912); the agreement here was not the usual one limiting one party's purchases to those made from the other party but to those made from a class of approved dealers—obviously a restraint though a less confining one; *Jersey-Creme Co. v. McDaniel Bros. Bottling Co.*, 152 S. W. 1187 (Tex. Civ. App., 1913); *Wood v. Texas Ice &*

INTERSTATE TRANSACTIONS

One of such variations was presented in a case decided only a few days later in the same court but in an opinion by Denman, J.<sup>97</sup> The commodity was again beer, the parties were manufacturer and dealer and the restrictions similar to those just considered but the contract provided for interstate shipment from the Pabst Brewery in Milwaukee to the dealer in Amarillo, Texas, with which, as interstate

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Cold Storage Co., 171 S. W. 497 (Tex. Civ. App., 1914); Carroll v. Evansville Bwg. Assn., 179 S. W. 1099 (Tex. Civ. App., 1915), sale by non-resident corporation but found to have been made in Texas; Penna. Rubber Co. v. McClain, 200 S. W. 586 (Tex. Civ. App., 1918); Am. Bwg. Assn. v. Woods, note 86, *supra*, reversing 183 S. W. 127 (Tex. Civ. App., 1916); Fred Miller Bwg. Co. v. Coonrod, 230 S. W. 1099 (Tex. Civ. App., 1921); Hubb-Diggs Co. v. Mitchell, 231 S. W. 425 (Tex. Civ. App., 1921), resale price agreement. Contra and wrong in view of the above line of cases, though in the writer's opinion justifiable as an independent interpretation of the Anti-Trust Law, Vandeweghe v. Am. Bwg. Co., 61 S. W. 526 (Tex. Civ. App., 1901), seller's agreement not to sell to others in dealer's territory; Nickels v. Prewitt Auto Co., 149 S. W. 1094 (Tex. Civ. App., 1912), assigning the curious reason that neither of the parties was shown to be a corporation and that both were not shown to be engaged in the business of buying and selling automobiles; Brenard Mfg. Co. v. Crowley Merc. Co., 260 S. W. 246, 247 (Tex. Civ. App., 1924), remark of Fly, C. J., that, "Giving exclusive territory for sale of the goods was not a violation of such laws."

In the so-called "Pump & Tank Cases," however, the Federal Courts have upheld certain oil producers in exclusive sale arrangements of a limited sort prohibiting the sale of competitor's oil and gasoline from pumps and storage tanks furnished at moderate rentals by the producers to the restricted dealer. Federal Trade Com'n v. Sinclair Refining Co., 261 U. S. 463, 43 Sup. Ct. 450 (1923), affirming decisions in 276 Fed. 686 (C. C. A., 7); 282 Fed. 81 (C. C. A., 3). It is understood that a District Court of Texas, Calhoun, J., has reached a like result in prosecutions under the Texas Anti-Trust Law. Whether this produces an economically desirable state of affairs in the trade is a question. The writer is advised that it presents a serious problem to the small oil companies unable to lay out large sums for such equipment and hampers them in their efforts to compete with the large producers, but this may be after all only one of the penalties of insufficient capital to meet the demands of present-day competition, like the straits of a department store which could not afford to maintain delivery service or extend monthly charge credit. Laying policy aside, the logical justification for the decision under the Texas statutes is found by analogy to the cases considered in the third section of this article (3 TEXAS LAW REVIEW, 349, 359), contracts accompanying the sale or lease of property, whereby the grantee or lessee agrees not to use the property so obtained in a way to injure the business of the grantor or lessor, Celli & Del Papa v. Galveston Bwg. Co., note 60, *supra*. See also discussion at page -, *supra*, likening covenants accompanying the sale or lease of plant or facilities to those accompanying the conveyance of premises.

The contracts of the various farmers' cooperative movements, recently organized, provide for sales exclusively to the association, a restriction obviously contrary to the Anti-Trust Law if it were not for the special statutory authority under which they are formed. They must on that account be regarded as standing apart and upon their own independent foundation. See Hollingsworth v. Texas Hay Assn., 246 S. W. 1068 (Tex. Civ. App., 1922); and on the general subject, Ballantine, 8 MINN. L. REV. 1.

<sup>97</sup>Fuqua v. Pabst Brewing Co., 90 Tex. 298, 38 S. W. 29 (1896).

commerce, the state had no power of interference. But the court applying the rule of the *Original Package Case*,<sup>98</sup> perceived that when the beer was once in Texas as the property of the purchaser and ready for resale in broken bulk, it was subject to state regulation, and therefore restrictions on its resale would be governed by state law.<sup>99</sup> An agreement by the purchaser not to sell out of his designated territory would, therefore, be invalid. But the curious feature of the case is that no such restriction appears and one of the restrictions<sup>100</sup> which the court pointed to as objectionable was that which prohibited the Pabst Company from selling (presumably from Milwaukee) to other dealers in Amarillo—obviously an interstate transaction. In another and later case,<sup>101</sup> however, exactly such a restriction was upheld by the

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<sup>98</sup>*Leisy v. Hardin*, 135 U. S. 100, 10 Sup. Ct. 681 (1890).

<sup>99</sup>*Accord*, *Pasteur Vaccine Co. v. Burkey*, 54 S. W. 804 (Tex. Civ. App., 1899); *Watkins Med. Co. v. Johnson*, 162 S. W. 394 (Tex. Civ. App., 1913), excellent opinion by Taliaferro, J., writ of error denied by Sup. Ct., 170 S. W. xviii; *W. T. Rawleigh Co. v. Fitzpatrick*, 184 S. W. 549 (Tex. Civ. App., 1916); *Same v. Mayberry*, note 100, *post*; *Newby v. Rawleigh Co.*, 194 S. W. 1173, and *Whisenant v. Shores-Mueller Co.*, 194 S. W. 1175 (Tex. Civ. App., 1917); *State v. Willys-Overland Co.*, 211 S. W. 609 (Tex. Civ. App., 1919). *Contra* and wrong *McCall Co. v. J. D. Stiff Dry Goods Co.*, 142 S. W. 659 (Tex. Civ. App., 1911).

<sup>100</sup>The other restriction notice was that the buyer was prohibited from selling any other beer. Since such other beer might be a Texas product not purchased in interstate commerce the original package doctrine would not need to be invoked to hold such a restraint bad. *Accord* on this point, *Columbia Carriage Co. v. Hatch*, note 86, *supra*; *S. S. White Dental Mfg. Co. v. Hertzberg*, 51 S. W. 355 (Tex. Civ. App., 1899); *State v. Racine-Sattley Co.*, 134 S. W. 400 (Tex. Civ. App., 1911), apparently involving a sale from without the state, though the court by a somewhat unwarranted assumption treated it as relating to intrastate sales; *Armstrong v. W. T. Rawleigh Co.*, 178 S. W. 582 (Tex. Civ. App., 1915); *Segal v. McCall Co.*, 184 S. W. 188 (Tex. Sup., 1916); *Pictorial Review Co. v. Pate Bros.*, 185 S. W. 309 (Tex. Civ. App., 1916); *W. T. Rawleigh Med. Co. v. Gunn*, 186 S. W. 385 (Tex. Civ. App., 1916); *Same v. Mayberry*, 193 S. W. 199 (Tex. Civ. App., 1917); *Dodd v. Rawleigh Co.*, 203 S. W. 131 (Tex. Civ. App., 1918); *State v. Willys-Overland Co.*, note 99, *supra*. *Contra* and wrong, *Eclipse Paint & Mfg. Co. v. New Process Roofing & Supply Co.*, 55 Tex. Civ. App. 553, 120 S. W. 532 (1909); *McCall Co. v. J. D. Stiff Dry Goods Co.*, 142 S. W. 659 (Tex. Civ. App., 1912). Compare also *Moroney Hardware Co. v. Goodwin Pottery Co.*, 120 S. W. 1088 (Tex. Civ. App., 1909), where there was no specific agreement not to handle the wares of competitors but such fidelity to the manufacturers was made a condition of certain rebates.

<sup>101</sup>*Albertype Co. v. Gust Feist Co.*, 102 Tex. 219, 114 S. W. 791 (1909)—decided under the law of 1903 but nothing turns on this fact. *Accord*, *Eclipse Paint & Mfg. Co. v. New Process Roofing & Supply Co.*, 55 Tex. Civ. App. 553 (1909), shipment from Ohio to Texas, but erroneously extending the rule to other classes of restraint, see note 100, *supra*; *Lock v. Citizens National Bank*, note 108, *post*. *Contra* under law of 1899, *Troy Buggy Wks. v. Fife & Miller*, 74 S. W. 956 (Tex. Civ. App., 1903), Ohio corporation's agreement not to sell to others in Dallas dealer's territory. Perhaps the corporation was making sales from a Texas headquarters, however, as it is stated that they held a permit to do business in the state. In *Francis T. Simmons & Co. v. Terry*,



same court and on the grounds just mentioned that it was a restriction on interstate commerce which the laws of Texas could not control, and properly construed, did not attempt to.<sup>102</sup> In that case the Albertype Company of Brooklyn, N. Y., made a sale of souvenir albums to a dealer in Galveston, who bought only on condition that no other such albums be sold by the maker to other dealers in Galveston for one year. Such restraint being in terms upon the manufacturer's right to make a sale from the State of New York to a place in the State of Texas, related to interstate commerce and so was not within the prohibitions of the Texas statute. But is not an agreement by a manufacturer outside of Texas not to sell to certain persons or places in Texas a restriction on the manufacturer's right to make an intra-state sale in Texas if he should open a branch within the state, at Dallas, for example? There can be no doubt of it. Either the court overlooked this possibility or, seeing it, chose to regard the restriction as relating only to the kind of sales which the parties had in mind when the contract and restriction were made. This may accomplish substantial justice in most cases and carry out the subjective intention of the parties, but it denies the plain effect of the words used.

This discussion raises a series of questions of the most practical sort in cases involving interstate commerce. The parties are usually interested in making whatever restrictions the law allows. Some or all of the following are usually imposed:

A. A covenant by the seller not to sell to others in a given territory and for a given time. This has just been considered. Although it has the support of the *Albertype Case* it has the weakness named and could only be assured of legality in a close case if the seller covenanted not to sell "in interstate commerce"—or from "without the State of Texas." As a matter of business risk most concerns would probably prefer to omit the suggested phrases and, with the

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79 S. W. 1103 (Tex. Civ. App., 1904), under the same law there was a similar agreement by Chicago firm, plus a reciprocal agreement by Texas dealer not to buy from others; the latter would be sufficient ground for the decision and it is not necessarily contrary to the *Albertype Case*. Both of these cases were disapproved in *Norton v. Thomas & Sons*, 91 S. W. 780 (Tex. Sup., 1906), on the ground that the Act of 1899, unlike those before and since did not deal with such cases. Whether that is so or not, the decision in the *Norton* case might be upheld on the *Albertype* precedent, since the agreement was by a non-resident corporation not to sell certain German liquors to other dealers in *Norton's* territory.

<sup>102</sup>Accord, *Waters-Pierce Oil Co. v. State*, 44 S. W. 936 (Tex. Civ. App., 1898), affirmed in *Waters-Pierce Oil Co. v. Texas*, 177 U. S. 28, 20 Sup. Ct. 518 (1899).



*Albertype Case* on their side, continue using the old unqualified language.

B. A covenant by the purchaser not to sell, (1) beyond the limits of territory assigned him or (2) at prices other than those fixed by the seller.

The first of these is clearly bad on the reasoning of the *Fuqua Case*<sup>103</sup> and to validate it by making it restrain the buyer only from sales outside of Texas would be to make it generally worthless for the use intended, since the buyer, usually a local dealer, would make no such sales anyway. It might, however, be effective and valuable in the case of a large wholesaler given the entire state for his territory.<sup>104</sup> The second is obviously bad also inasmuch as it attempts to deal with the disposition of property in the hands of the buyer after it has passed out of the channels of interstate commerce. To modify this clause so that it would relate to resales only beyond Texas in interstate commerce would not only be to make it worthless along the line just suggested in "1" above but it would furthermore profit nothing since the federal anti-trust laws have been held to prohibit resale price fixing by agreement in interstate commerce.<sup>105</sup>

C. A covenant by the purchaser not to handle competing lines during the term of the contract. Such a restriction may be phrased in either of two ways the distinction between which is worth the noting: (1) not to sell the products of competing manufacturers, or (2) not to buy the products of a competing manufacturer for resale. The first of these, "1," is not only clearly in restraint of trade under the Texas statute in that it purports to chain up in the dealer's hands any wares which he may purchase from competing sellers, but it is incapable of revision so as to accomplish anything worth while to the manufacturer. To validate the covenant by modifying its terms so as to prohibit only sales outside of Texas (in interstate commerce) would be to make it generally useless, if indeed it would then be legal. But the second form of covenant, "2," while invalid in its present form as prohibiting the purchase of competing wares in Texas, can be made of some practical value to a few concerns dealing in products of distant sections of the country which are usually sold in interstate commerce from a head office and not locally through branches. The pattern manufacturers might, for instance, with some hope of legality, restrain local department stores "from

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<sup>103</sup>Note 97, *supra*.

<sup>104</sup>See the *Coca-Cola Case*, note 110, *post*.

<sup>105</sup>*Dr. Miles Med. Co. v. Park & Sons*, 220 U. S. 373, 31 Sup. Ct. 373 (1911).

buying, in interstate commerce for resale, the patterns of competitors."<sup>106</sup>

D. Occasionally a covenant by the purchaser to engage exclusively in the business of selling the manufacturer's products,<sup>107</sup> which amounts, of course, to an agreement not to sell any other wares whether competitive or not and which is therefore merely a broader restraint of the character considered above and is bad *a fortiori* for the same reasons.

From the above discussion it is evident that foreign corporations enjoy relatively little immunity from the operation of the Texas anti-trust laws simply because of the interstate character of their trade.

There remain to be considered a number of cases which present anti-trust problems from yet another angle.

#### PATENTS, COPYRIGHTS AND TRADE-MARKS.

In some of these cases patented goods have been the subject of the sale and, on the theory that a patent grants a monopoly, the Texas court has permitted the seller in such a case to place restrictions on the buyer's right of resale.<sup>108</sup> It is believed, however, that this reasoning is unsound and it is opposed to the present view of the United States Supreme Court.<sup>109</sup> So far as ownership and right to sell or not to sell is concerned the manufacturer of unpatented wares has as complete a monopoly as his fellow manufacturer who produces patented goods. The patent monopoly is for another purpose and ought not to be the foundation for continuing unlawful restrictions after the ownership has passed from the hands of the patentee. It may be questioned, too, whether the special privileges granted to manufacturers of patented wares might not suggest to some persons

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<sup>106</sup>A federal court might quite possibly, however, hold this invalid under the Clayton Act and on the authority of *Standard Fashion Co. v. Magrane Houston Co.*, 258 U. S. 346, 42 Sup. Ct. 360 (1922).

<sup>107</sup>So, for example, in *Dickerson v. McConnon*, note 86, *supra*, and in the various patent medicine cases.

<sup>108</sup>*Lock v. Citizens Nat'l Bank*, 165 S. W. 536 (Tex. Civ. App., 1914), following *Bement & Son v. Nat'l Harrow Co.*, 186 U. S. 70, 22 Sup. Ct. 755 (1901). See also *Clark v. Cyclone Woven-wire Fence Co.*, 54 S. W. 392 (Tex. Civ. App., 1899), wherein perhaps the restrictions were upheld on this ground though the judge did not indicate squarely the reason for his favorable decision. Presumably the same rule would apply in the case of a copyright. See the next following note. But suggesting the contrary, *Jenkins, J.*, in *Coca-Cola Co. v. State*, note 110, *post*.

<sup>109</sup>A summary of the pertinent cases is found in *Boston Store of Chicago v. American Graphophone Co.*, 246 U. S. 8, 38 Sup. Ct. 257 (1918). Patents and copyrights are treated alike.

the idea of obtaining patents on really unpatentable articles for no better purpose than thereby to evade the anti-trust law. If there were no opposition before the government, the patent might issue and there would be no power of the state of Texas to contest its validity in a collateral anti-trust proceeding.

One case concerning trade-marked goods has arisen and presents much the same problems.<sup>110</sup> The Coca-Cola Company having a trade-mark on the name Coca-Cola to represent both a syrup of its manufacture under a secret process and also the carbonated water drink produced with such syrup, granted an exclusive license to one bottling company in Texas to manufacture Coca-Cola—the drink—from syrup bought solely from the Coca-Cola Company and compounded in accordance with the prescribed formula. Since the drink was known to the purchasing public by name<sup>111</sup> it is apparent that the latter restrictions would be enforced as a plain matter of the law of unfair competition even in the absence of contract; the bottler would not be permitted to pass off some substitute or adulterated beverage as Coca-Cola<sup>112</sup> and what the law freely grants it can hardly condemn because specifically contracted for.

Another restriction on the bottler—confining his business to the state of Texas—may be upheld on the ground suggested earlier in the article,<sup>113</sup> since all that it purports to do is prevent the bottler's trade from expanding to interstate proportions.<sup>114</sup> Still another restriction, this one on the manufacturer, which limited his sales of syrup in Texas to the particular bottler is obviously within the rule of the Albertype decision and unobjectionable. But there remains a provision of the contract which gives the writer more trouble; it is the agreement by the bottler not to resell the Coca-Cola syrup. No one who has observed the crooked course of business pirates but will agree that the only really effective way to prevent adulteration and passing off is to give the Coca-Cola Company in such a case as this a wide measure of control over its products reaching, as it were, almost to the throats of the thirsty public, and that such control would include the restriction against resale of Coca-Cola in syrup form—but that is an argument of policy and sound economic justice and the court,

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<sup>110</sup>Coca-Cola Co. v. State, 225 S. W. 791 (Tex. Civ. App., 1920).

<sup>111</sup>Coca-Cola Co. v. Koke Co., 254 U. S. 143, 41 Sup. Ct. 113 (1920).

<sup>112</sup>Coca-Cola Co. v. Brown & Allen, 274 Fed. 481 (N. D. Ga., 1921).

<sup>113</sup>*Ante*, at page 140, in the text discussion accompanying footnote 104.

<sup>114</sup>Equally valid under the Federal law, Phillips v. Iola Portland Cement Co., 125 Fed. 593, 61 C. C. A. 19 (8th Cir., 1903), Sanborn, Thayer and Vandevanter, J. J.

with the unyielding Median law against trusts before it, has been known to turn back petitions of that character with recommendations that they be addressed to the legislature. Nor is the writer convinced by the contention, which had the approval of the court, that the agreement imposed no restriction on trade in the syrup because "there was no such trade." There was potential trade or it would not have been prohibited. (The public is increasingly buying concentrates with which to prepare its own liquid refreshment on trips and at home—and purchases are evidently made when possible by other bottlers,—unlicensed, dishonest ones perhaps in part—but who shall say as a matter of law that there are not those who would use Coca-Cola syrup in the manufacture of another delicious drink, not called Coca-Cola,—a perfectly lawful enterprise beyond doubt.)

Title to the syrup unquestionably passes to the bottler<sup>115</sup> and what he gets in addition from the manufacturer is not the privilege of using or disposing of syrup which he owns absolutely, but of making, if he so desires, a drink named Coca-Cola by using the approved syrup. Unless then we are willing to say that just because an article bears a valid trade-mark name (for example American Flyer for toy trains), any dealing therein is outside the protection of the anti-trust law (which the earlier decisions did declare as to patented goods but which the learned judge toward the close of his opinion in the instant case indicates he would not hold as to copyrighted works,<sup>116</sup> we must regard any prohibition on the resale of Coca-Cola syrup in that form as a restriction denounced by the Anti-trust Law and the decisions like *Fuqua v. Pabst Brewing Co.*<sup>117</sup> under it.<sup>118</sup>

#### EXCLUSIVE SERVICE CONTRACTS.

Another group of cases calls in question the validity of agreements to perform services for one person and not for another. Suppose a prominent banker were to sit for a portrait by an equally prominent artist and accept the work only on condition that the artist agree to make a likeness of no other person in that community. Since the Anti-trust Law concerns itself with trade and commerce and not

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<sup>115</sup>See *Prestonettes, Inc., v. Coty*, 264 U. S. 359, 44 Sup. Ct. 350 (1924).

<sup>116</sup>225 S. W. at p. 795.

<sup>117</sup>Note 97, *supra*.

<sup>118</sup>Compare criticism of the *Crystal Ice Case*, in note 78, *supra*, which dealt with an absolute prohibition on resale of a commodity, ice, unprotected by any special legislation.



with personal services,<sup>119</sup> the validity of the supposed restraint would seemingly be cast back onto the common law test of reasonableness for solution—and doubtless the contract would then be sustained. The same would be true if the subject of the painting were a landscape. But a closer case would be reached if a “commercial artist” were employed to make a number of hasty sketches of the same landscape and deliver them on calendars to be used by the banker as advertising matter. We would be nearing the case of a sale of goods with a covenant not to sell similar goods or works of art to others. And it requires but a slight shift in the facts to carry us over to a clear case of selling goods with restrictions on the seller. Let it be supposed that a lithographing company would agree to prepare several thousand colortype reproductions of the same landscape on advertising calendars to be sold exclusively to the banker. Can there be any doubt that such an arrangement would fall within the range of the decision in *Texas Brewing Co. v. Templeman*<sup>120</sup> as an illegal restriction on the manufacturer’s right to sell his products to any one anywhere in the state of Texas? The true test of what is within the purview of the statute and what is without must in the very nature of things be somewhat vague but it doubtless depends on whether the services or the goods are the things primarily purchased. Even the portrait case involved a transfer of the title to certain oil and canvas and on the other hand even the lithograph case involves services in producing the goods contracted for, particularly where they are made to order; but somewhere between these extremes is the line of demarcation between the rendering of services with an incidental sale of goods and a sale of goods with a mere incidental performance of a service.

The Texas cases form interesting illustrations of the point. In *Forrest Photographic Co. v. Hutchinson Grocery Co.*<sup>121</sup> there was a so-called sale to the grocery for advertising purposes of “Photo Calendar Trading Tickets” which entitled the bearer to a calendar with his own photograph on it. The photographers agreed not to sell such

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<sup>119</sup>See COMPLETE TEXAS STATUTES, 1920, PENAL CODE, Art. 1454, quoted at length in note 20, *supra*. There would be the possibility suggested in connection with the Patterson Case, note 30, *supra* (3 TEXAS LAW REVIEW 348-349), that the present statutory prohibition of combinations in restraint of “the free pursuit of any business authorized or permitted by the laws of this State” might be held to invalidate restraints on professional and personal services. It is doubted that this was the legislative intent and the cases now under consideration indicate the judicial view that it was not.

<sup>120</sup>Note 90, *supra*.

<sup>121</sup>108 S. W. 763 (Tex. Civ. App., 1908).

tickets to competitive grocery stores. What this all obviously amounted to was an agreement to make photographs of certain subjects as ordered by the grocery company and mount them on calendars instead of the usual mats, and not to perform like services for others. The sale of tickets was only the machinery for carrying the arrangement into effect. The Court of Civil Appeals therefore properly denied the applicability of the Anti-trust Law to the case<sup>122</sup> and likewise upheld the contract as reasonable at common law.

The *Cyclone Fence Case*, already mentioned above in connection with patents,<sup>123</sup> might conceivably be worked out on similar reasoning, for the exclusive right there granted was "to build, weave and construct wire fences in the field" under certain letters patent. The weakness of this argument, however, is evident for the predominating factor in that transaction was the sale of fence, and in addition there can be no doubt that even the sale and erection of fence is a "business authorized or permitted by the laws of this state."<sup>124</sup> A like contention with like weaknesses might be made as regards the restrictions on introducing "the system of vaccinating animals" dealt with in the case of *Pasteur Vaccine Co., Ltd., v. Burkey*.<sup>125</sup> The obvious concern of the parties was the sale of vaccine, not the performing of veterinary services.

But the case which brings the most wrinkles to the brow on its facts is the most recent,<sup>126</sup> and is interesting in that while the new case has been discovered since the preparation of the above comment on the older cases, the facts of this case are approximately like one of the hypothetical cases proposed above. Here the defendant bought advertising matter from the plaintiff with reciprocal restrictions—the seller to furnish like matter to no one else in the town and the buyer to use it only there and not to let others use it anywhere.

The parties referred to the subject matter of the contract as "service" but no importance can be attached thereto for that term is badly overworked. The plaintiff's next argument apparently centered about the fact that it employed experts to prepare the illustrations and copy and that part of them at least were made expressly for the defendant. But that argument, while pertinent, is not conclusive.

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<sup>122</sup>The observations in note 119, *supra*, however, become increasingly pertinent here because photography is universally regarded as a business.

<sup>123</sup>See note 108, *supra*.

<sup>124</sup>See note 119, *supra*.

<sup>125</sup>Note 99, *supra*. Compare also the *Jersey-Creme Case*, note 96, *supra*, and its language concerning "bottling privileges."

<sup>126</sup>*Schow Bros. v. Adva-Talks Co.*, 232 S. W. 883 (Tex. Civ. App., 1921).

No one would suppose that advertising blotters bearing a picture of Minnehaha Falls or Washington Crossing the Delaware would be converted into advertising "service" by the fact that the original was prepared by an artist in the seller's employ or that they were fitted for the buyer's express use by the addition of some personal advertising sentiment like "Bascom Scrapes, Barber, Solicits Your Patronage." What Bascom buys in such a case is blotters; he has title and cannot be prevented by agreement from selling to anyone who may want to strike out Bascom's name and substitute his own.

Nor is the case advanced any by the argument that "the plaintiff only sells one party in the same town"; the law cares nothing of how little business one chooses to do in a place, but only inhibits agreements binding the party to such commercial temperance or abstinence after a single sale. And of course plaintiff's avowed intention not to sell the cuts for resale as goods could hardly avail in the face of a contrary legal policy. Finally, the considerate observation of the court that the value of advertising depends on its exclusiveness is at best a reason why it would be good to have the statute otherwise, for the value of a stock of neckwear might be similarly, if not equally, affected by that consideration. Nevertheless, on a balance of all the facts and considering that the cuts and copy were for use in newspaper advertising and seem in part to have represented special original composition for the buyer, it is believed that the service element predominates and that the case is sound and correctly decided.

#### ENTIRE OUTPUT AND OPTION CONTRACTS.

Only recently it seems has an option contract come before the courts in connection with the Anti-Trust Law. It was in the case of *Amarillo Oil Co. v. Ranch Creek Oil & Gas Co.*<sup>127</sup> Stripped of complicating and collateral matters the agreement of the parties in that case was that the Pipe Line Company had an option to take any or all of the Oil Company's production, and reciprocally that the Oil Company had the option to supply the entire needs of the Pipe Line to the exclusion of all others. Considering first for the sake of clarity the legality of these provisions as they would be if they were binding contracts of purchase and sale we translate them into the following: (1) The Pipe Line Company is bound to buy and the Oil Company to sell the entire output of the latter's oil fields; (2) the Oil Company agrees to supply and the Pipe Line Company to take all

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<sup>127</sup>271 S. W. 145 (Tex. Civ. App., 1925).



the oil which the Pipe Line can use in its Amarillo trade. Taking these up in inverse order we find the second to be nothing but our old friend the *Templeman-Brewery Case* done over in oil: an agreement to buy exclusively from one source, hence a restraint on the buyer's right to buy where he pleases. Is this agreement helped any by reconverting it into its original form—a seller's option to supply? The answer must be "no," for the buyer is equally restrained in either case. There is no requirement that both parties be restrained.

Returning now to the first of the agreements we find it to be an entire-output contract.

Suppose one of the great mail order companies were to contract for the entire production of an industry for one year, a very ordinary transaction, would such an agreement be void in Texas as creating a trust? Certainly that would be surprising doctrine in most states of the Union—though perhaps no more surprising than other Texas doctrines on that subject—and it is difficult to believe that it will be so held in Texas; yet how can it be avoided, for if a contract restraining a buyer from buying is bad, why not likewise a contract restraining a seller from selling—indeed, trading and doing business is more often thought of as selling goods than buying them, though the two are complementary features of one transaction.

One can carry this line of reasoning out to some rather disconcerting results. Is an ordinary six months' option contract on say one hundred barrels of sugar a violation of the Texas anti-trust law? The making of the contract is sufficient to constitute the "combination of acts" and the restraint on trade and commerce is evident enough since for six months the seller may not sell that sugar even though he is offered a higher price and at the end of the period may be left with it on his hands. Here is where the option differs from an ordinary contract to sell because in the latter case the second possible trade is restrained only because a trade has already taken place so that trade in general is not curtailed. Are option contracts as a business device therefore taboo in Texas? That seems unlikely and when the question is raised possibly the answer will be that the seller is not restrained from selling the particular character of merchandise but only a certain lot of it and he may sell to all who would buy without violating his option contract,—or at least if he is unable to do so, it is for financial or physical reasons unconnected with the restraint imposed by that contract.<sup>128</sup>

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<sup>128</sup>If that line of thought be sound it would seem that one could certainly give an option on, or contract outright to sell, the entire output of one



Any discussion of this particular matter must at best be mere speculation for the *Amarillo Oil Case* involved too many issues to make its decision a clear-cut pronouncement on the option contract,—indeed, the court was far from definite in indicating the ground of its opinion on the anti-trust issue in any aspect and even an appeal promises little with regard to the specific problem of option contracts.

Barring some few opportunities for lawful restraints such as the ones suggested above in connection with interstate business or patents or personal services, and the seller's undoubted privileges of avoiding the clutches of the Anti-Trust Law by doing business on a genuine agency basis<sup>129</sup> (which, however, as an avenue of escape, is infested with terrors of a different sort<sup>130</sup>), it is apparent from the cases considered that any restraint on the manufacturer which prohibits his selling his products in any part of the state or at any prices other than those fixed by competition, or any like restraints on the dealer, including also a prohibition on his buying and reselling the wares of other manufacturers, will be held void and the contracts of which they are a part unenforceable.

If the contract form of restraint be abandoned there will yet remain for trial by the manufacturer and consideration by the courts the matter of a mere refusal to sell to one who cuts prices, invades his neighbor's territory or handles a competing line of wares. The ques-

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factory—even if it was the seller's only factory because he could build others and properly sell from them. Correspondingly, there ought to be nothing illegal about a contract to buy exclusively from one concern for one year all the gloves, for example, needed in a certain store, and yet it is to be doubted whether this will be held in view of the line of cases in note 96, *supra*, although they do not decide the point. Practically a legal way of avoiding a restraint is of little value when it necessitates the opening of another store in order to handle other lines of gloves. The *Amarillo Oil Case* contains the very issue here discussed since on the buyer's side the arrangement was to take all the oil needed in its *Amarillo trade*. The seller's agreement, on the contrary, reached out to take in all his oil-producing facilities.

<sup>129</sup>Windmill Case, note 85, *supra*.

<sup>130</sup>If the agent of a non-resident corporation is authorized to make sales in Texas (not merely to take orders for acceptance at the home office elsewhere) the principal is then doing business in Texas and must register and pay taxes or its contracts are unenforceable, on grounds having nothing to do with anti-trust law. It is the second horn of the dilemma which makes of less practical value to corporations than would first appear the observations of Holmes, J., in *Dr. Miles Medical Co. v. Park & Sons*, note 104, *supra*, as follows: "In the first place, by a slight change in the form of the contract the plaintiff can accomplish the result in a way that would be beyond successful attack, if it should make the retail dealers also agents in law as well as in name and retain the title until the goods left their hand. . . ." The price of such a change may be too high,—and usually is. Compare *Miller v. Goodman*, 40 S. W. 718 (Tex. Sup., 1897), with the illuminating opinion of Jenkins, J., in *La Fon v. Falls Rubber Co.*, note 86, *supra*. The first-named case seems to lay down too liberal a rule of exemption.

tions under the Texas Anti-Trust Law will then have reached the juncture which the federal cases have already reached—at least on the matter of resale price fixing. No one doubts the privilege of a manufacturer to sell to everyone or anyone, and to select those with whom he wishes not to deal “without the assignment of any reason for such desire,”—or indeed with the assignment of the reason even if it be that the buyer is a price cutter. This is recognized by the United States Supreme Court in the *Colgate Case*,<sup>131</sup> but the privilege is so whittled down by subsequent decisions in the same court that it is well-nigh illusory. In the first place, since resale price fixing contracts both express and implied are condemned,—as indeed they should be together if either is to be,—a manufacturer who has ceased to do business with a price cutter may well consider the dangers of restoring him on assurances that price cutting will not be repeated, since a jury might readily enough take that to be evidence of an implied contract to keep up prices. In the second place, while the manufacturer may refuse to deal with price cutters, he may not under the federal law conduct a spying campaign to ascertain what dealers fall within that category—nor may he make systematic records of those to whom he will not sell. The Beechnut decision<sup>132</sup> which announced this rule, provoked a storm of protest in circles both interested and disinterested, since it seemed in substance to say that while sellers had a privilege, they could not take the normal and only businesslike means of exercising it. The result of such a decision is exactly what might be expected: the law as thus announced is ineffective. The writer has inquired at shop after shop in several cities as to the ground for uniform prices on items of standard merchandise only to be told that no contract or promise is exacted of the dealer to maintain that manufacturer’s “suggested price,” but that, “If we cut prices we can’t get any more.”

No Texas cases have been found which carry the problem exactly to this point, but some give signs of a start in that direction.

The patent medicine companies whose contracts had suffered most severely at the hands of the courts, were the pioneers in shifting their ground to comply with the law and yet, so far as possible, to accomplish the desired business results. They struck from their contracts those restrictions which had been denounced as violating the

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<sup>131</sup>United States v. Colgate & Co., 250 U. S. 300, 39 Sup. Ct. 465 (1919).

<sup>132</sup>Federal Trade Com’n v. Beechnut Pkg. Co., 257 U. S. 441, 42 Sup. Ct. 150 (1922), followed recently and perhaps extended in *Oppenheim, Oberndorf & Co. v. Federal Trade Com’n*, 5 Fed. (2nd), 574 (C. C. A., 1925).

Anti-trust Law<sup>133</sup> and depended on the issuance of instructions and suggestions to salesmen. The question then simply becomes one of determining whether in fact such subsequent instructions and what was done under them amount to an additional agreement which legally attaches itself as a leaden weight to the original contract and drags it under. One of several things may happen: The seller may say to the buyer, "Your contract forbids you selling outside of the territory you selected." Either this is so or it is not. If not, the contract remains valid and the seller's declarations and the buyer's suppositions about it are nothing to the point.<sup>134</sup> The seller may say, "Our regulations forbid,—etc. We believe it to the best interests of your salesmen not to overlap their territory." An acquiescence<sup>135</sup> by the salesman in this regard may indicate nothing more than that he is of like opinion and voluntarily chooses not to exercise his undoubted legal privilege of selling where he pleases. Even if it is found that the salesman specifically replied to the suggestion by saying, "All right, I promise not to sell out of my territory," there is still wanting a consideration for such a promise and the mere shipment of goods by the seller<sup>136</sup> does not seem to supply the deficiency since the shipment is under the original contract and represents only the doing of something which the seller is already obligated to do. Nor, of course, would an express or implied promise by the seller to impose similar unwarranted restrictions on neighboring salesmen. But the whole attitude of the court seems to be one of suspicion; the readjusted transaction is considered to be a mere shuffle and the paper contract apparently is thought not to represent the real contract between the parties,<sup>137</sup> but a piece of evidence prepared in advance,—a sort of

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<sup>133</sup>See *Dodd v. Rawleigh Co.*, 203 S. W. 131 (Tex. Civ. App., 1918).

<sup>134</sup>*W. T. Rawleigh Co. v. Marshall*, 220 S. W. 1111 (Tex. Civ. App., 1920), per Jenkins, J. Compare *J. R. Watkins Co. v. Meyer*, 255 S. W. 1002 (Tex. Civ. App., 1923). See on the admissibility of evidence as to what the seller's agent and the buyer understood concerning the terms of the contract, *Pasture Vaccine Co. v. Burkey*, note 99, *supra*, at p. 806. And compare as to prior declarations by the agent, *Lock v. Citizens Nat'l Bank*, note 108, *supra*, at page 539.

<sup>135</sup>Emphasized in *Whisenant v. Shores-Mueller Co.*, 194 S. W. 1175, 1177; in *W. T. Rawleigh Co. v. Lemon*, 247 S. W. 683 (Tex. Civ. App., 1923), the final decision of the court turned on the point that the buyer was not shown to have acted on the supplementary instructions.

<sup>136</sup>The date of shipment is noted in *Newby v. Rawleigh*, 194 S. W. 1173 (Tex. Civ. App., 1917), not, however, for the erroneous purpose of showing consideration, but to fix the date when the arrangements between the parties were definitely concluded.

<sup>137</sup>See *W. T. Rawleigh Co. v. Marshall*, second appeal, 248 S. W. 153 (Tex. Civ. App., 1922), also *Same v. Smith*, 231 S. W. 799 (Tex. Civ. App., 1921); *Same v. Land*, 261 S. W. 186 (Tex. Civ. App., 1924).



window dressing affair. No fault can be found with decisions which strike down shams and get at the real facts. The danger here, however, is that the courts will penalize every move on the seller's part which looks like an attempt to restrain. The law has seemingly not yet said that a seller must sell to those who do things which he considers demoralizing to his trade and the fact that the economic pressure of a refusal to sell may be, and usually is, as effective as any agreement to the same end is no reason for making a fiction out of the seller's legal right to use it.<sup>138</sup> It may be, however, that even threats and persuasion by a seller listened to and heeded by the buyer will be condemned as a combination of acts, independent of agreement.<sup>139</sup> The case of *State v. Willys-Overland*<sup>140</sup> goes a long way along that line but there was in that case an additional factor, by way of agreement that the buyer should have only one-half the customary discount on automobiles sold out of his territory. Such a variety of economic pressure bears much resemblance to the premium arrangement upheld in *Moroney Hardware Co. v. Goodwin Pottery Co.*<sup>141</sup> and it is a question whether the two cases are reconcilable in spirit at least.

In this state of the law it is evident that the lawyer does not possess that which he most desires,—ability to prophesy the decision of a court on given facts. It is apparent though, that a fair, sleek, well-formed contract followed by a litter of suspicious and objectionable looking instructions is ordered to be gone from Texas by organized society speaking from the bench. What one would like to see put to the test of judicial approval is an arrangement under which the seller said, "We do not have to sell and will not sell to a dealer who handles other lines or solicits in territory which another of our dealers is canvassing. We will stop selling to any dealer who does these things but we ask no assurances from him that he will not." The world of commerce, however, does not manufacture simplified cases to order.

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<sup>138</sup>But see the emphasis laid by the court on economic pressure in *W. T. Rawleigh Co. v. Land*, note 137, *supra*, "In retaining the option to sell or not sell to Land, as it saw proper, the appellant reserved the power to coerce him into compliance with any terms it might elect to impose as conditions upon which it would extend credit or supply him with merchandise." Compare the *Colgate Case*, note 131, *supra*.

<sup>139</sup>But where there is found to be a restrictive covenant in existence, the fact that the buyer disregards the restriction will not, of course, "take from the contract the taint of illegality." *Fred Miller Bwg. Co. v. Coonrod*, 230 S. W. 1099, 1101 (Tex. Civ. App., 1921).

<sup>140</sup>211 S. W. 609 (Tex. Civ. App., 1919).

<sup>141</sup>Note 100, *supra*.



It is probably too late, after the mass of Texas precedent,—greater it is believed than that of all the other states,—to accomplish anything by a criticism of the entire trend of judicial opinion on the Anti-trust Law. But since there was no compelling requirement of logic why restraining contracts between manufacturer, wholesaler and dealer relative to the sale of marketable goods should be condemned as a combination or conspiracy<sup>142</sup> under the Anti-trust Law, one instinctively turns to the matter of economic policy and social advantage. It is here that the observer of cases and conditions wonders if the court may not have pursued a mistaken course. The policy of the law as judicially interpreted, has frankly been to force competition, not only in classes of merchandise but in specific brands or makes. It is not enough that Ivory meets other brands of white floating soap in competition on the grocer's shelves; there must be so far as the state can compel it, competition between different lots of Ivory Soap in separate grocers' hands.

But it is seriously arguable that all the public needs or wants is unrestrained trade in a field or class, not in brands. If B's make of soap is retailed cheaper than A's, there is competition in the vending of soap, whether the reason A's is higher is that he charges the retailer more or that he regulates the resale price. The buyer after one trial can satisfy himself whether he wishes to pay the higher price or not. If the choice of enough buyers is the less expensive brand the competitive influence is felt by manufacturer A and he must adjust his affairs accordingly.

Indeed there is interfield competition<sup>143</sup> to be reckoned with if the price goes too high. The public would seem safe enough under such conditions.<sup>144</sup> Why then should the law without any serious purpose

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<sup>142</sup>*Ante*, page 132, in the text accompanying footnotes 79-81. No separate discussion of the conspiracy article of the statute (see *ante*, 3 TEXAS LAW REVIEW, 359, note 61) has been undertaken herein because, while some cases have been decided upon that portion of the Anti-Trust Law, there appears to have been no case of the class considered in this article wherein any different result would have been reached because of the statutory denunciation of conspiracies.

<sup>143</sup>Such as brick, wood, stone, tile and cement in the building industry, etc.

<sup>144</sup>Against this the writer in a paper read before a round-table conference of the Association of American Law Schools at Chicago, December, 1924, advanced the following argument for consideration: That the public is afflicted with "advertisitis"; that goods are sold hardly so much on their merits as on the catch phrases of advertising concerns whose services, in so far as they are excessive and superfluous, impose an additional toll on the buyer; that the makers whose advertising happens to become fixed in the public mind are in a measure subsidized thereby and can charge an extra profit and resist the competition of other equally good merchandise on an artificial basis independent of the normal law of values, and supply and demand; that the

to accomplish spend its efforts toward invalidating innocuous contracts, encouraging breach of contract and removing from sellers a limited power of control which in one respect at least is beneficial to the public by preventing the advertisement at cut prices of a purposely inadequate stock of some standard articles as a drawing card to sell a gullible buyer some inferior article.<sup>145</sup>

The second objection to the state of the Anti-Trust Law is that it will fail of its merciless declared purpose because trade in well known brands of merchandise is and will be conducted, the whole Texas legislature and judiciary to the contrary notwithstanding, on the basis of a controlled resale price and territory. A few patent medicine contracts are broken and the defaulting parties assisted to a somewhat ignoble escape which the judges themselves do not approve by a policy of supposedly overriding importance derived from the Anti-Trust Law. Thus is a statute aimed at great, sinister monopolistic aggregations of capital,<sup>146</sup> which exact the last farthing from the common people, deflected to a picayunish target,—the resale and territorial arrangements between manufacturers and dealers, no matter how small, who have not the remotest hope of a monopolistic position in their field.

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public is being increasingly given legal protection against its own heedlessness and that here is a case for such protection. This argument, however, has found little favor with either business men or students of the subject and it is not urged herein.

<sup>145</sup>See Edward S. Rogers, *Predatory Price Cutting as Unfair Competition*, 27 HARV. L. REV., 139 (1913).

<sup>146</sup>The cases touching that specific problem have been omitted from this article and left for possible separate consideration in the future.

## IS THERE MORE THAN ONE CLASS OF COMMUNITY PROPERTY IN TEXAS?

In an earlier issue of this REVIEW<sup>1</sup> the writer discussed the contractual capacity of married women in Texas, and it was there noted that under the rules of the common law a married woman had no legal capacity to enter into a contract; and, further, that no such power had been conferred upon her by direct legislative enactment. It was stated, "If her common law position as to contractual capacity has been changed, it must be that she has some contractual capacity *by implication* as the result of her separate property rights. Therefore, it is necessary to define all property that is made the separate property of the wife by our statutes, and to inquire as to the extent of her control over it."

The very earliest statutory provisions found under Articles 4621 to 4623, inclusive, of TEXAS REVISED CIVIL STATUTES, 1911, as amended in 1913, 1917, and 1921, were discussed in detail as to what then was deemed to constitute the separate property of the wife. At that time the celebrated case of *Whitney Hardware Company v. McMahan*<sup>2</sup> represented the latest expression of our Supreme Court with respect to the power of the married woman to enter into a contract under the clause, "The wife shall have the sole management, control, and disposition of her separate property, both real and personal." That case presented a fact situation where the contract was reasonably necessary to the care and preservation of her separate property. The writer submitted as an open question whether or not a married woman could enter into a contract that is highly speculative in its nature with respect to her separate property.

Recently our Supreme Court has handed down two opinions of primary importance:

*Cauble v. Beaver-Electra Refining Company*<sup>3</sup> squarely decides that a married woman in pursuance of the authority vested in her in the management and control of her separate property can enter into extremely hazardous or highly speculative contracts. Of equal importance is the case of *Arnold v. Leonard et al.*,<sup>4</sup> which creates a different classification of the property rights of the wife. In effect,

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<sup>1</sup>Contractual Power of Married Women in Texas, 1 TEXAS LAW REVIEW 281.

<sup>2</sup>111 Tex. 242, 231 S. W. 694 (1921).

<sup>3</sup>274 S. W. 120 (Tex. Sup. Ct., 1925).

<sup>4</sup>273 S. W. 799 (Tex. Sup. Ct., 1925).

it seems to construe our various statutory enactments as creating a new kind or class of "community property." Moreover, the latter case, coupled with the decision in *Gohlman, Lester & Company v. Whittle et al.*,<sup>5</sup> confers upon a married woman the power to contract in pursuance of her authority to manage and control her "community property." It is believed that a thorough consideration in these pages of these recent decisions may well be justified.

In the *Arnold Case* the Court of Civil Appeals of the First Supreme Judicial District certified the following question to the Supreme Court:<sup>6</sup>

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§273 S. W. 808 (Tex. Sup. Ct., 1925).

The facts as stated by the Court of Civil Appeals are:

The suit was brought by the appellee, Mrs. Adele E. Leonard, a married woman, joined pro forma by her husband, St. Clair Leonard, for an injunction to restrain the appellant, Gus I. Arnold, as administrator of the estate of Gus Schultz, deceased, from seizing or attempting to subject certain rents and revenues from a number of pieces of real estate in the city of Galveston, all being the separate estate of the wife, Mrs. Adele E. Leonard, to the payment of a judgment owned and held by the appellant against St. Clair Leonard, the husband.

The facts alleged in the bill for injunction were agreed to be true by both parties to the suit, and showed, as recited, that all the real property involved is owned by Mrs. Adele E. Leonard, the wife, as her separate estate; that the judgment held and owned by the appellant in his capacity as administrator of the estate of Schultz was against the husband, St. Clair Leonard, and represented a community indebtedness; that in these circumstances the administrator was seeking, by threatening the issuance of writs of garnishment on the judgment against various renters and tenants of Mrs. Leonard's separate real estate, to subject the rents and revenues thereof to the payment of this judgment.

The appellant in the trial court answered the petition and prayer for an injunction with a special exception to the effect that it appeared from the allegations of the petition itself that the rent and revenues, the collection of which was so sought to be enjoined, constituted the community estate of Mrs. Adele E. Leonard and her husband, St. Clair Leonard, and by virtue of the constitution of Texas, Article 16, Sec. 15, the rents and revenues of the separate estate of the wife are community property, and subject to the debts of the husband, and that Article 4621, c. 3, Title 68, of the Revised Statutes of Texas of 1911, and the amendment thereof by the act of the regular session of the Thirty-seventh Legislature, c. 130, Sec. 1 (Vernon's Annotated Civil Statutes, Supplement 1922, Article 4621), which undertakes to declare the rents and revenues of the wife's separate real property to be her separate estate, is contrary to the terms of the constitution referred to, and is therefore void.

The trial court overruled the special exception of the appellant, and granted the injunction prayed for by the appellees, restraining the appellant from any manner undertaking to have the rents and revenues from the separate real property of the appellee, Mrs. Adele E. Leonard, applied to the liquidation of the judgment so held against her husband, holding that the rents and revenues of her separate estate constituted her separate property and were beyond the reach of a creditor of the community estate of the husband and wife.

It being obvious that the sole question involved in the case is as to the constitutionality of said Revised Statutes, Article 4621, because of



Is the act of the legislature above stated, which declares the rents and revenues of the wife's separate property to be her separate estate, violative of Article 16, Section 15, of our state constitution? In this connection we call attention to the case of *Rudasill v. Rudasill* (Tex. Civ. App.) 219 S. W. 843.

The lower court also submitted the following supplemental certificate:

Since filing our original certificate, which shows that the fundamental question in this case is the validity of the acts of the legislature providing that the rents and revenues derived from the separate estate of a married woman shall be her separate property, our attention has been called to the question of whether the provision of the Act of 1917,<sup>7</sup> declaring that the rents and revenues derived from the wife's separate property shall be her separate property, or the similar provision in the Act of 1921<sup>8</sup> can be considered as embraced by or within the purview of the caption or title of either of said acts, as required by Section 35, Article 3, of the constitution of this state.

The Court of Civil Appeals then asked:

Is the provision of the Acts of 1917 and of 1921 that the rents and revenues derived from the wife's separate property shall be separate property of the wife a valid provision in either of those statutes?<sup>9</sup>

Mr. Justice Greenwood, in answer to the foregoing certification, says:

Since rents and revenues derived from the wife's separate lands are entirely without the constitutional definition of the wife's separate property, and since the legislature can neither enlarge nor diminish such property, it follows that the portions

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the importance of the question and of some doubt entertained by different members of this court as to the correctness of the trial court's determination of it, we deem it advisable to certify for your decision the following question.

<sup>7</sup>GEN. LAWS OF TEX., 35th Leg., p. 436, VERNON'S ANN. CIV. STAT., Supp. 1918, Art. 4621.

<sup>8</sup>GEN. LAWS OF TEX., 37th Leg., p. 251, VERNON'S ANN. CIV. STAT., Supp. 1922, Art. 4621.

<sup>9</sup>Section 15 of Article 16 of the Texas constitution declares:

All property, both real and personal, of the wife, owned or claimed by her before marriage, and that acquired afterward by gift, devise, or descent, shall be her separate property; and laws shall be passed more clearly defining the rights of the wife, in relation as well to her separate property as that held in common with her husband. Laws shall also be passed providing for the registration of the wife's separate property.

of the Acts of 1917<sup>10</sup> and 1921,<sup>11</sup> which undertake to make rents and revenues from the wife's separate lands a part of her separate estate, are invalid.<sup>12</sup>

The legislature, in defining the wife's rights in and to her separate property and property held in common with her husband, could lawfully deprive the husband of the power granted him for many years to manage and control the wife's separate property and portions of the community property which were derived from use of the wife's separate property or from her personal exertions, and could confide the management, control, and disposition thereof to the wife alone, and could exempt, not only her separate property, but said portions of the community from payment of the husband's debts. In making this grant of enlarged rights to the wife, and working the corresponding diminution in rights to be exercised by the husband, the legislature was lawfully defining the wife's rights in both her separate estate and common property, as expressly authorized by the constitution. But the legislature could not divest the husband of all interest in and to property which, under the constitution, was guaranteed either to the community or to the hus-

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<sup>10</sup>The Act of 1917 (Acts 1917, c. 194) bore the following title:

An act to amend Article 4621, chapter 32, of the General Laws of the 33rd Legislature of Texas, passed at the Regular Session thereof, being "An act to amend articles 4621, 4622, and 4624, title 68, chapter 3, of the Revised Statutes of Texas, 1911, concerning the marital rights of parties, defining separate and community property of the husband and wife, conferring upon the wife the power to make contracts, authorizing suits on such contracts, giving the wife control over her separate property, placing limitations upon such control, giving her control over the rents from her separate real estate, interest on bonds and notes, and dividends on stock owned by her, and over her personal earnings, exempting the same from debts contracted by the husband, providing that the joinder of the husband shall be necessary to a conveyance or encumbrance of the wife's lands, bonds and stocks, except that upon the order of the district court she may convey the same without the joinder of her husband, repealing Article 4625, title 68, chapter 3, of the Revised Statutes of Texas, 1911, and all other laws and parts of laws in conflict herewith, and declaring an emergency," by providing that when the husband shall have permanently abandoned the wife, or shall be insane she may, upon order of the district court, encumber, transfer or convey her separate real estate, bonds and stocks, without the joinder of her husband in such encumbrance, transfer or conveyance, and by providing that in such instances, upon order of the district court, she may transfer and convey her separate real estate, without the joinder of her husband in such transfer or conveyance, whether such separate real estate be occupied and claimed by her as a homestead or otherwise, repealing all laws and parts of laws in conflict herewith, and declaring an emergency.

<sup>11</sup>"An act to amend Article 4621, chapter 3, title 68, of the Revised Statutes of Texas of 1911, as amended by chapter 194, section 1 of the Acts of the Regular Session of the Thirty-fifth Legislature, by providing that the separate property of the husband shall not be subject to torts of the wife, and the separate property of the wife shall not be subject to the torts of the husband."

<sup>12</sup>Arnold v. Leonard et al., note 4, *supra*.

band's separate estate, and use the same to enlarge the wife's separate estate beyond its constitutional limits.

We therefore answer to the certified questions that so much of the Act of 1917 and of the Act of 1921 as undertook to declare the rents and revenues of the wife's separate realty to be her separate estate was violative of Section 15 of Article 16, and of Section 35 of Article 3 of the constitution, but that the provisions of said acts, and of the prior Act of 1913, are valid, which render the rents and revenues of the wife's separate lands free from liability to forced sale for the payment of debts contracted by the husband.

It would seem that the court followed a sound rule of constitutional law in declaring that Section 15 of Article 16 of the constitution of Texas<sup>13</sup> defines all property that may be acquired as the separate property of the wife during coverture by specifying the particular methods by which such property may be acquired, and, that the import of such constitutional limitations by implied negation denies to the legislature the power of further increasing the separate property of the wife.<sup>14</sup>

There seems to be no constitutional limitation upon legislative authority to empower the wife to manage and control the community assets.<sup>15</sup>

Is a statute expressly providing for additional classes of separate property, and which is invalid for that purpose, operative in creating a new class of community property essentially different in its characterization from the general class of community property which has existed from the earliest formation of the state government? Admitting that the legislature had the lawful power by an express enactment to vest in the wife legal control of the community assets, is it sound construction to hold that an express statute adding to her separate property and giving her the "sole management, control, etc.," of said property, as such, is legally effective in creating a new class of community property? The court, speaking through Justice Greenwood, says:<sup>16</sup>

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<sup>13</sup>See page 156, *supra*.

<sup>14</sup>*Ezell v. Dodson*, 60 Tex. 332 (1883); *COOLEY, CONSTITUTIONAL LIMITATIONS* (7th Ed.), p. 89; *Koy v. Schneider*, 110 Tex. 378, 218 S. W. 479, 221 S. W. 880 (1920); *Dickson v. Strickland*, 265 S. W. 1010 (Tex. Sup. Ct., 1924).

<sup>15</sup>*Warburton v. White*, 176 U. S. 484, 44 L. Ed. 555, 20 Sup. Ct. 404 (1900):

The Legislature could as well have provided that the wife could convey, as the husband; and if it had power to say that either could dispose of the community interest of the other, it could say that neither could do so.

<sup>16</sup>*Arnold v. Leonard et al.*, note 4, *supra*.



There can be no doubt that the Act of 1913 left the rents and revenues of the wife's separate lands assets of the community estate. *Red River National Bank v. Ferguson*, 109 Tex. 290, 206 S. W. 923; *Whitney Hardware Company v. McMahan*, 111 Tex. 245, 231 S. W. 694; *Scott v. Scott* (Tex. Civ. App.) 170 S. W. 273; *Tannehill v. Tannehill* (Tex. Civ. App.), 171 S. W. 1051. Nor can there be any doubt that the Act of 1913 and the subsequent acts intended to exempt rents of the wife's separate lands from payment of a community debt contracted by the husband. The provisions of the Acts of 1917 and 1921, declaring the exemption, is separate and distinct from the portions of the acts undertaking to change the ownership of rents and revenues from the wife's separate lands. Hence such provision might be operative in each act, despite failure of the purpose to make the rents separate property of the wife. *Western Union Telegraph Company v. State*, 62 Tex. 633.

Certainly the statement of the court to the effect that the Acts of 1917<sup>17</sup> and 1921<sup>18</sup> declaring the exemptions are separate and distinct from the portion of the act undertaking to change rents and revenues from the wife's separate land, is open to question. In declaring such exemption the framers of the act must have had in mind their declaration to make the rents and revenues from the wife's separate land her separate property and the "management and control" of such "separate" property was necessarily given under the belief that the entire statute was constitutional.

It may be fairly said that the following excerpt from the Acts of 1917 and 1921<sup>19</sup> does expressly exempt those items of "community property" from the debts of the husband and by implication give to the wife the management and control thereof, unless the Supreme Court should declare such provision void on account of its uncertainty in meaning:

Neither the separate property of the wife nor the rents from the wife's separate real estate, nor the interest on bonds and notes belonging to her, nor dividends on stocks owned by her, nor her personal earnings shall be subject to the payment of debts contracted by the husband nor of torts of the husband.

It should be noted that Article 4614, REV. CIV. STAT., 1925, provides:

All the property of the wife, both real and personal, owned or claimed by her before marriage, and that acquired afterwards

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<sup>17</sup>Acts of 1917, p. 436, cf. REV. CIV. STAT. 1925, Art. 4616.

<sup>18</sup>Acts of 1921, p. 251, cf. REV. CIV. STAT. 1925, Art. 4616.

<sup>19</sup>Art. 4616, REV. CIV. STAT. (1925).



by gift, devise or descent, as also the increase of all lands thus acquired and the rents and revenues derived therefrom, the interest on bonds and notes belonging to her, the dividends on stocks owned by her, shall be the separate property of the wife.

The classification of "the interest on bonds and notes belonging to her and dividends on stocks owned by her" as *her separate property* is a provision not found in the amendments of 1917 and 1921. Apparently this change, which under the rule of the principal case is also unconstitutional, in so far as it attempts to enlarge the separate property of the wife, was made by the codifying commission.<sup>20</sup>

It is submitted that the result in the *Arnold Case* is logically sound. The decision recognizes the constitutional limitations imposed upon legislative authority. The court in its construction of our puzzling statutes evidences a liberal attitude in its recognition of the rights of the wife in the community property. It upholds the exemptions given to certain items of "community property" by the various statutes. It could hardly be denied that the result of such a decision is in complete accord with the present social and economic position of the married woman. The sustaining of the

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<sup>20</sup>The Thirty-ninth Legislature in its adoption of the Revised Civil Statutes of 1925, Title 75, Chapter 3, sets forth the rights of married women in Articles 4614-4627. Generally it seems the codifiers attempted to follow the express provisions of the various acts and amendments. Necessarily *Arnold v. Leonard*, note 4, *supra*, invalidates portions of Articles 4614, 4615, 4619, 4620 and 4621, in so far as these provisions do not recognize the Supreme Court's latest classification of community property.

Where there is a conflict between the various session acts with amendments and the provisions of the 1925 revision the following excerpt from *American Indemnity Company v. City of Austin*, 246 S. W. 1019 (Tex. Sup. Ct., 1922), is noteworthy:

Section 43 having given the Legislature authority to revise the laws, without, within itself or by any other section of the constitution, having prescribed the method of revision, or without having limited the legislative power, except in so far as this power is limited in the enactment of any other law, the legislature has plenary authority to revise, and may do so in its own way and to any extent, provided, always the substance of the proposed revision is not otherwise prohibited by the constitution. It may do so by omitting laws from the code, which, when done, under the repealing clause, are repealed. It may do so by changing words or phrases for the purpose of harmony or brevity, without in fact changing the meaning, or it may do so by the incorporation of new and material matter in the revision. The term "revise" is broad enough to permit the amendment of existing laws or statutes in these several ways. *New Century Dictionary*; *Webster's New International Dictionary*; *American National Insurance Company v. Collins* (Tex. Civ. App.), 140 S. W. 553, 556; *State v. Towery*, 143 Ala. 48, 39 South. 309; *Jeffries v. Board of Trustees*, 135 Ky. 488, 122 S. W. 813, 816; *Falconer v. Robinson*, 46 Ala. 340, 348; *Cortesy v. Territory*, 7 N. M. 89, 32 Pac. 504, 505; *SUTHERLAND'S STATUTORY CONSTRUCTION* (2nd Ed.), Article 269; *Pratt Institute v. New York*, 183 N. Y. 151, 75 N. E. 1119, 5 Ann. Cas. 198, 199. See also *Berry v. State*, 69 Tex. Cr. App. 602, 156 S. W. 626 (1913).

validity of the specified exemptions affords maximum protection to all parties who have contracted with married women in reliance upon the validity of the 1917 and 1921 amendments. I do not mean that the decision in *Arnold v. Leonard* has clarified Texas law. Perhaps the legal status of a married woman with respect to her property rights is more uncertain today than it has ever been in our history, but the decision is keenly sensitive of the present economic position of the married woman and it evidences a strained effort on the part of the court to deal as kindly as possible with the vagaries of the legislature.

As a result of the decision in the *Arnold Case* two questions of considerable importance are presented:

1. What constitutes the community property of the husband and wife? How shall it be classified? What are the exemptions granted the different classes and who has the management and control of such classes?

2. What is the present contractual capacity of a married woman in Texas with respect to her separate and her community property rights?

In view of the decision in the *Arnold Case*, we now have two distinct classes of community property. Each one in its legal characteristics is essentially different from the other. Section 15 of Article 16 of the constitution provides: "and laws shall be passed more clearly defining the rights of the wife in relation as well to her separate property as that held in common with her husband." The framers of the constitution made no effort to itemize or classify the separate property of the husband or that held by the wife in common with her husband. The power of the legislature to pass laws governing the classification and control of the separate property of the husband and the community property is without limitation. Evidently the legislature has the power to give sole management, control, and disposition of the separate property of the husband to the wife. However, in 1848 the legislature provided:

All property acquired by either the husband or the wife during their marriage except that which is the separate property of either shall be deemed the common property of the husband and wife, and during coverture may be disposed of by the husband only. All the effects which the husband and wife possess at the time the marriage may be dissolved shall be regarded as common effects or gains unless the contrary is satisfactorily proved.

It should be borne in mind that the legislature in 1848 defined the separate property of the husband as "all property of the husband,

both real and personal, owned or claimed by him before marriage and that acquired afterwards by gift, devise, or descent, as also the increase or all rents thus acquired shall be his separate property." The legislature in 1913 made the following amendment: "*and the rents and revenues therefrom.*" The foregoing statutory provision contravenes no express nor implied constitutional limitation and now stands as a definition of the separate property of the husband.

Since 1848 the above statute has expressed the policy of the legislature with respect to the community property of the husband and wife. Article 4619 of the REVISED STATUTES of 1925 contains the identical verbiage of the Act of 1848. While it is true that the husband has been given the power of management and disposition of that community property as contemplated by the above statute, yet it must be remembered that the property has always been liable for community debts, and, furthermore, that by virtue of the vesting of the management and control of the community property in the husband his separate property is also liable for community debts.<sup>21</sup> Doubtless the public generally has accepted "community property" to mean essentially all that would fall within the definition expressed in Article 4619.<sup>22</sup>

Professor Simkins, in an article in a former issue of this REVIEW, has studiously collected the Texas decisions and has presented a learned discussion of the orthodox class of community property.<sup>23</sup> Consequently my observations on community property are restricted to the newly created class.

When the Supreme Court upheld the validity of the following clause from the amendments of 1917 and 1921: "Neither the separate property of the wife nor the rents from the wife's separate real

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<sup>21</sup>REV. CIV. STAT., 1925.

<sup>22</sup>The New Century Dictionary defines *community* as, "The common possession or enjoyment, the holding or sharing of interests, possessions, or privileges in common by two or more individuals: as, *community* of goods: *community* of interests, between husband and wife." In explaining what is meant by the popular conception of community property, the author says:

Community property in civil law (and through French and Spanish law in California, Louisiana, Nevada, Texas, Idaho, Montana, Washington and also New Mexico and Arizona), is the property of husband and wife exclusive of the antenuptial property of either, and of property acquired by either by bequest, inheritance or gift. All other acquisitions during marriage are the joint property of both, and the husband has the active power of disposal during the life of both, the wife's rights being meanwhile passive. On the death of either, the survivor administers much as in the case of partnership, the survivor being entitled to one-half, and the heirs, etc., of the deceased to the other half.

<sup>23</sup>"Some Phases of the Law of Community Property in Texas," 3 TEXAS LAW REVIEW 363.



estate, nor interest on bonds and notes belonging to her, nor dividends on stocks owned by her, nor her personal earnings, shall be subject to the payment of debts contracted by the husband nor of torts of the husband," it recognized the existence of certain items of property which under the constitution can only be called "community property."<sup>24</sup> The case clearly decides that one of these items, the rents and revenues of the wife's separate land, is not subject to the debts of the husband. Apparently all income derived from the wife's separate property other than that falling within the above "community property" classification comes within the orthodox community property and is under the sole control of the husband.<sup>25</sup>

It seems undeniable that the same exemption would apply to the other items. Article 4616<sup>26</sup> re-enacts the above exemption. It is striking that we find no express legislation conferring the power of management, control and disposition of these items of community property upon anyone. The *Arnold Case* simply upholds the validity of the statute exempting them from the husband's legal obligation.

Article 4623<sup>27</sup> provides:

Neither the separate property of the husband nor the community property *other than the personal earnings of the wife and the income, rents, and revenues from her separate property* shall be subject to the payment of debts contracted by the wife except those contracted for necessities furnished her or her children.

This statute, with the exception of what is here italicized, is merely a re-enactment of the Act of 1848. The original statute certainly contemplated no power of management and control or contractual capacity on the part of the wife. The "contracts" of the wife meant only substantive liabilities imposed by statute upon the husband for necessities furnished the wife and children. If Article 4623<sup>28</sup> is interpreted as a new act perhaps we might say that the legislature contemplated that the personal earnings of the wife and the income, rents, and revenues of her separate property shall be subject to debts contracted by her. But if this be true, why were not the items "the interest on bonds and notes belonging to her and dividends on stocks owned by her" also included? Since these items have been exempted

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<sup>24</sup>Arnold v. Leonard, note 4, *supra*.

<sup>25</sup>Article 4619, REV. CIV. STAT. (1925); 3 TEXAS LAW REVIEW 368, and cases cited.

<sup>26</sup>REV. CIV. STAT. 1925.

<sup>27</sup>REV. CIV. STAT. 1925.

<sup>28</sup>REV. CIV. STAT. 1925.



from the husband's debts under the amendments of 1917 and 1921 along with the rents, and revenues from her separate property and her personal earnings. any argument that the legislature contemplated that it was giving her management and control of these items as a species of community property very likely attributes to it an intention which it never possessed.

Who, then, has the management and control of this new-born class of community property? The Supreme Court in the recent decision of *Gohlman, Lester & Company v. Whittle*,<sup>29</sup> has substantially answered this question. In that case one J. W. Whittle, authorized and acting as agent for his wife, Ada T. Whittle, a wholly undisclosed principal, entered into a contract with respect to certain cotton grown upon her separate land whereby she obtained certain advances from Gohlman, Lester & Company and was enabled to safely hold the cotton for better prices. Gohlman, Lester & Company brought suit against both J. W. Whittle and wife. In passing upon the question of the liability of Mrs. Whittle as the principal upon the contract the court, speaking through Mr. Justice Greenwood, says:

She could not have exclusive power to rent her separate lands unless she had authority to fix the terms of the rental contracts. In consideration of the promise of a portion of the crops and a refund of necessary advancements, she could grant a binding lease and incur an obligation to make advancements. Clothed with power to make such contracts, she is entitled to enforce them and to receive their benefits. In receiving the crops from the tenants and availing herself of the services and facilities of plaintiffs in error to advantageously market the cotton, Mrs. Whittle was only adopting a convenient and usual means of securing the full fruits of her own binding contracts with her tenants. The husband has been made as impotent as the wife formerly was in matters pertaining to renting the wife's separate lands, and collecting and disposing of rents of such lands, including the enforcement of all essentially incidental contractual obligations. This means that the husband acts lawfully in such matters only to the extent of his derivative power from his wife; that is, as her authorized agent. The wife has here succeeded to the authority formerly confided to the husband. It follows that the facts found by the trial court and offered to be proven by plaintiffs in error did not warrant the complete discharge which Mrs. Whittle was awarded under the judgment of the trial court as affirmed by the Court of Civil Appeals.

Doubtless the fact situation presented in the above case was very conducive in influencing the decision reached. Since the "commu-

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<sup>29</sup>Note 5, *supra*.

nity property," namely, the revenues from the wife's separate estate, in that case was so closely interwoven in interest with the power of the wife to manage, and control her separate property, it offered a strong incentive to the court to recognize the contractual capacity of the wife with respect to the "community property" in question. To deny the wife's power to contract to sell the growing crops on her land or to enjoy the actual benefit usually incident to title, such as securing suitable tenants, would in reality invalidate her *management and control of her separate property*. Does this same contractual capacity extend to the wife with reference to the other items found in this new class of community property, her personal earnings, interest on bonds and notes belonging to her and on stocks owned by her?<sup>30</sup>

As it has sustained the validity of the exemption of these items from the husband's obligations under the amendments of 1917 and 1921, the Supreme Court, in the absence of new legislation, has no alternative than to uphold the exclusive legal power of the wife to solely manage, control, and dispose of this new species of community property.

Article 4615,<sup>31</sup> re-enacting the acts of 1915, page 103, provides:

All properties or moneys received as compensation for personal injuries sustained by the wife shall be her separate property except such actual and necessary expense as may have accumulated against the husband for hospital fees, medical bills, and all other expenses incidental to the collection of said compensation.

Unquestionably this statute is void in so far as it attempts to add to the separate property of the wife.<sup>32</sup> As no exemption is found in the act against the liability of such compensation for the husband's debts such compensation plainly falls within the orthodox classification of community property, and is, therefore, under the sole control and disposition of the husband.

Finally, what is the wife's contractual capacity with respect to her separate and her community property rights? We have seen that under the decision in the *Gohlman, Lester Case*,<sup>33</sup> a married woman

<sup>30</sup>It is believed that *Gohlman, Lester & Company v. Whittle*, answers the query raised in Judge Montgomery's comment on *Arnold v. Leonard*, in 4 TEXAS LAW REVIEW 91, as to the wife's power to contract with respect to the new class of community property.

<sup>31</sup>REV. CIV. STAT. 1925.

<sup>32</sup>*Arnold v. Leonard*, note 4, *supra*.

<sup>33</sup>Note 5, *supra*.

has the implied power to enter into a binding contract in the management and control of the newly created class of community property. The Supreme Court, speaking through Mr. Justice Greenwood in *Whitney Hardware Company v. McMahan*,<sup>34</sup> said:

As incidents to the wife's power of exclusive management and control of her separate property and of the specified portions of the community, she becomes vested with all such contractual power relative to same as is requisite to make her power effectual. The right to control and manage a store building or an improved farm and to receive the rents, would be or would soon become valueless if the holder of the right were denied the power to make a binding rental contract and the power to make engagements for repairs or betterments.

The contract in that case, however, was reasonably necessary in the preservation of the wife's separate estate. The recent decision of the Supreme Court in *Cauble v. Beaver-Electra Refining Company*<sup>35</sup> represents a marked extension of the principle underlying the decision in the *McMahan Case*. The following excerpt from the opinion gives the material facts:

Mrs. S. O. Cauble, plaintiff in error, engaged in the oil business upon her separate account, with the understanding with her husband, H. F. Cauble, that whatever profits she should make therefrom were to belong to her personally, and constitute her separate estate. She first began business as a broker, and from this business made commissions, from which she derived about \$48,000. With this money she began to buy and sell oil leases, and also bought and operated drilling rigs and machinery. She would operate these drilling rigs in drilling oil wells upon her own leases, and also leases owned by other parties. While so engaged in operating her drilling machinery and for the necessary purpose of operating same, she purchased from Beaver-Electra Refining Company, defendant in error, fuel oil of the market value of \$4452.58.

The refining company brought suit against Mrs. Cauble upon her personal contract. In upholding her liability upon the contract the court in part said:

Notwithstanding she was engaged in the oil business without the power to make contracts in the management and control of her separate property, the law gives her the exclusive right to manage and control. There is nothing to indicate that she would be required to allow this property to deteriorate by non-

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<sup>34</sup>Note 2, *supra*.

<sup>35</sup>Note 3, *supra*.



use or that she was to be restricted in her management and control so as not to allow such property to be put to such use as would aid her in her purpose.

A contract for the purchase of fuel oil to be used in the operation of drilling rigs is highly speculative. If a married woman is bound by such a contract it would seem that she could make any sort of a contract, whether beneficial or not, that a feme sole could make, so long as her contract comes within her sole management, control, and disposition of her separate property. If she has some specific property it would appear that she has full legal capacity to enter into consensual relations concerning it. If she has no separate property and no community property falling within the new statutory class, then she is powerless to enter into any sort of binding agreement. The legislature has given her no express contractual power.<sup>36</sup>

Will the Supreme Court uphold the contractual capacity of the wife with reference to the community property exempted from the husband's obligation to the same general extent that it has recognized her contractual capacity in her management and control of her separate property in the *Cauble Case*? Obviously, in the absence of new legislation, the Supreme Court has no escape therefrom. The physical existence as well as the practical importance of the new kind of community property cannot be denied. In so far as contractual capacity is a reasonably necessary incident to the law's protection of these items of community property the court must recognize it as existent in the wife. As the only legal interest the husband has in the new class of community property is a right to share equally upon the dissolution of the marriage the wife apparently is free to contract in its management and control. It would appear that the wife stands in the position of a trustee of the husband's interests, accountable as such to the separate estate of the husband. Apparently she could not give it away to a stranger or fraudulently deprive the husband's estate of his ultimate right in the property. The husband stands in such a legal position with respect to the wife's interest in the orthodox community property.<sup>37</sup> While the right of the wife to maintain an action for community property rests upon Article 4635,<sup>38</sup> there seems to be no reason why a court of equity should not protect

<sup>36</sup>*Red River National Bank v. Ferguson*, 109 Tex. 290, 206 S. W. 923 (1918).

<sup>37</sup>Article 4635, REV. CIV. STAT. 1925: *Turner v. Turner*, 204 S. W. 133 (Tex. Civ. App., 1918); *Krenz v. Stromier*, 177 S. W. 179 (Tex. Civ. App., 1915); *Sparks v. Taylor*, 99 Tex. 411, 90 S. W. 485 (1906).

<sup>38</sup>REV. CIV. STAT. 1925.



the ultimate interest of the husband against fraud or gross mismanagement on the part of the wife.

The husband is personally bound on a contract that he makes for the benefit of the general community estate. He is entitled to have a judgment secured against him upon such contract satisfied out of the community property. No resort can be had to the separate property of a deceased husband to pay community debts if there is sufficient community property to pay them.<sup>39</sup> Suppose the assets of the "community property" under the sole control and management of the wife are insufficient to satisfy a contractual obligation created by the wife in the exercise of such power: is the liability that she incurs her personal liability, so that the residue of a judgment secured against her may be satisfied out of her separate property, or is the right of the judgment creditor limited to the assets of the "community property" under her contract?

In the *Gohlman, Lester Case*,<sup>40</sup> Mr. Justice Greenwood says:

We think the legislature intended the wife to exercise contractual discretion—as complete and comprehensive as was formerly possessed by the husband—in the management and disposition of ordinary chattels such as cotton. Not only have the statutes since 1913 committed entire dominion over such property to the wife alone, but they have gone further and expressly exempted not only the husband's separate property, but all community property, except such as is placed under the wife's single control, from the payment of debts contracted by the wife save for necessities for herself or children. The almost obvious implication of the statutes is to make her separate property and the portions of the community committed to her charge liable for the payment of the wife's contracts entered into as necessary incidents to the exercise of her powers of management, control, and disposition. For if such property is not so liable, then nothing is, and an intent cannot reasonably be ascribed to the legislature to authorize an obligation and at the same time render its enforcement impossible. . . . It follows from the above conclusions that the district court and the Court of Civil Appeals erred in holding the petition subject to general demur-

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<sup>39</sup>Clarke v. First National Bank of New Boston, 210 S. W. 677, 679 (Tex. Comm. App. 1919); Houston Oil Company v. Choate, 232 S. W. 285 (Tex. Comm. App. 1921); Art. 3661, REV. CIV. STAT. 1925.

The Supreme Court in *Leatherwood v. Arnold*, 66 Tex. 414 (1886), by way of dictum said: "The surviving husband is personally liable for community debts. If he has extinguished the community interest in a given item of community property it is still subject to community debts because the community debt is also his individual liability."

<sup>40</sup>Note 5, *supra*.

rer in so far as plaintiffs in error sought a personal judgment against defendant in error, Mrs. Ada T. Whittle.

A fair construction of the above portion of the opinion sustains the right of a creditor to look to the separate property of the wife. By analogy the wife should be entitled to have the "community property" under her control exhausted before her separate estate could be reached, as we have seen that the husband is entitled to such priority with respect to his separate property where he has incurred personal liability as a result of a community undertaking.

In conclusion it may be said that in the absence of new legislation the Texas lawyer is doomed to grope in darkness in his search for answers to countless questions that will arise concerning the property rights and the contractual capacity of the married woman. It is submitted that the only satisfactory solution of our present problem lies with the legislature, and it is hoped that that body, bearing in mind the constitutional limitation imposed upon its authority to define the separate property of the wife, will enact a statute which defines all community property and which *expressly* provides for such exemption from liability and for such control and disposition by either spouse as appears most satisfactory to the legislature. Certainly the time is ripe for a statute conferring upon the wife the privilege to contract as a *feme sole*.

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## EVIDENCE OF DECLARATIONS OF TESTATORS IN TEXAS

The benefits of the rule of the common law which excludes hearsay evidence are no doubt very considerable. Those benefits, like most others, however, are bought at a price. This price is the time, labor; and confusion which ensue from the practical necessity of carving out numerous exceptions under which hearsay evidence is admitted in situations where normally the need for its use is greater than the danger. The statement of a simple principle, easily recognizable in the heat of a trial, upon which to base each exception, which shall yet not carry the exception beyond the need for it, is an ideal still very far from being realized. In fact, few subjects of the law have been productive of more subtle distinctions and perplexing diversities than this field of hearsay exceptions. And of these exceptions, those relating to the admission in will contests of the declarations of the testator are a veritable "dark and bloody ground" of judicial conflict. Of what is probably the most widely cited judicial review of the topic,<sup>1</sup> the leading text writer (who has indeed shed great light upon the darkness) has said that it is a "quicksand for those who seek guidance on the subject."<sup>2</sup>

The writer has thought that in the process of elucidation an attempt to state the results that have been reached in one jurisdiction, Texas, may be of value.<sup>3</sup>

The declarations fall into the following classes, discussed in their order: (a) declarations of plan, design or intention; (b) declarations of feeling; (c) declarations showing mental incapacity; (d) declarations bearing on undue influence, in general.

### (a) *Declarations of Plan, Design, or Intention.*

Declarations of the testator's intention to make or not to make provision for certain persons, or as to other testamentary intentions, pronounced before the will in question is claimed to have been made may be offered as bearing upon various issues. Such declarations may be offered and are relevant and admissible<sup>4</sup> upon the issue of

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<sup>1</sup>Throckmorton v. Holt, 180 U. S. 552, 45 L. Ed. 663, 21 Sup. Ct. 474 (1901).

<sup>2</sup>WIGMORE, EVIDENCE, Sec. 1736, n. 1.

<sup>3</sup>General References: WIGMORE, EVIDENCE, Secs. 1732-1740; S. W. DIGEST, title "Wills," Secs. 54, 165, 297, 305.

<sup>4</sup>Brown v. Mitchell, 88 Tex. 350, 357, 31 S. W. 621, 623 (1895). (Declarations of testatrix that she desired to make a will leaving all her property to her husband, made, respectively, a year before and a few weeks before, the execution of the will in conformity with the declarations, held admissible in sup-

*testamentary capacity* at the time of the will, for if the will accords with previous declarations it indicates that the will conforms to the normal testamentary desires of the testator, whereas, if it varies from the declarations, it may indicate that an abnormal mental vagary was embodied in the will. And upon the same theory of proving or disproving a departure under pressure, from the normal plans of the testator, such declarations are admissible upon the issue of *undue influence*<sup>5</sup> and *fraud*. Such latter declarations (offered to show the abnormality of the disposition in the will) while they shed light upon the state of the testator's mind would not be sufficient to show the external fact of the exertion of pressure,<sup>6</sup> and unless such conduct is independently proved, the exclusion of the declarations would not be reversible error.<sup>7</sup> The evidence, likewise, of declarations evincing an intent that the declarant's property should pass in a certain way at his death when made *after* the will in question would seem at least as forceful as those made before as indicating the normal trend of decedent's desires, and hence as showing a probable abnormality of intention at the time of making the will and hence the probability of mental incapacity, undue influence, or fraud.<sup>8</sup>

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port of testamentary capacity); *McDonald's Estate v. McDonald*, 150 S. W. 593 (Tex. Civ. App., 1912). (Evidence that decedent had told contestant that she should have all his property held admissible, but the opinion does not make it clear whether on the issue of fraud, undue influence or testamentary capacity); *In re Burns' Estate*, 21 Tex. Civ. App. 512, 52 S. W. 98 (1899).

<sup>5</sup>*Scott v. Townsend*, 106 Tex. 322, 166 S. W. 1138 (1914), (citing *Johnson v. Brown*, 51 Tex. 65 (1879), which is, however, a case wherein the issue was forgery); *In re Burns' Estate*, 21 Tex. Civ. App. 512, 52 S. W. 98 (1899).

<sup>6</sup>*In re Burns' Estate*, 21 Tex. Civ. App. 512, 52 S. W. 98 (1899); *Holmes v. Houston*, 241 S. W. 1039 (Tex. Civ. App., 1922).

<sup>7</sup>*Helsley v. Moss*, 52 Tex. Civ. App. 57, 113 S. W. 599 (1908). ("She wanted to fix it so her children should have what she had, etc.," offered by contesting disinherited children, held properly excluded, there being no independent evidence of undue influence or mental incapacity.)

<sup>8</sup>*In re Burns' Estate*, 21 Tex. Civ. App. 512, 52 S. W. 98 (1899). (Contestants offered evidence of declarations inconsistent with the will, to the effect that D. L. and his two daughters would get his property after his death, held admissible. "While the authorities are in conflict, we think, upon their weight and principle, that declarations of an alleged testator as to his testamentary intention, whether made before, after, or at the time of making an alleged will, are admissible on the issue of undue influence, as well as that of testamentary capacity. *Jackson v. Kniffen*, 3 Am. Dec. 397, and authorities cited in note 3; 7 Am. & Eng. Ency. Law, 73; *Collagan v. Burns*, 57 Me. 449; *Roberts v. Trawick*, 17 Ala. 55; *Chappell v. Trent*, 90 Va. 849, 19 S. E. 314; *BEACH, WILLS*, Sec. 115; *SCHOULER, WILLS*, Sec. 243; *Shailer v. Bumstead*, 99 Mass. 121; *Waterman v. Whitney*, 11 N. Y. 166; *Mooney v. Olsen*, 22 Kan. 77. Such declarations are not admissible as primary proof that the testator was influenced in making the will by fraud or compulsion, for in such relations they are regarded as hearsay. But, while they are not admissible to prove the actual fact of fraud or improper influence, they are competent to establish the influence and effect of the external acts (if any



Thus far we have discussed the admissibility of declarations of intention as bearing upon the declarant's *mental state* at the time of making the will, such mental state always being in issue in variant ways in contests on grounds of fraud, undue influence, and incapacity. On the other hand, there may arise the issue, was a certain purported will *actually executed* by the testator, or was a certain will *actually revoked*? Here the issue is, not alone the state of mind of the testator, but his *conduct*; i. e., the actual signing or burning, etc.

The general rule of evidence applied in other fields than the law of wills is that declarations of intention if made under circumstances of apparent sincerity are admissible as circumstantial evidence that the declarant afterward acted or omitted to act, in conformity with the intention declared.<sup>9</sup> Such declarations would not usually, perhaps, standing alone, be *sufficient* upon which to base a jury finding as to such acts,<sup>10</sup> but they would be relevant and *admissible* evidence upon such issue. In accordance with this principle, it would seem clear that a declaration of intention to make a will, or to make a will of a certain tenor, or not to make a will, would be admissible upon the issue of whether a certain will offered for probate was *forged* or not.<sup>11</sup> Upon the same reasoning a declaration of intention consistent or inconsistent with a claimed subsequent *revocation* would

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are shown) upon the mind of the testator himself. *Campbell v. Barrera* (Tex. Civ. App.), 32 S. W. 725; *Shailer v. Bumstead*, 99 Mass. 121; *SCHOULER, WILLS*, Sec. 243.")

<sup>9</sup>WIGMORE, EVIDENCE, Sec. 1725.

<sup>10</sup>They would clearly be insufficient to establish the *execution* of a will in probate proceedings for which direct proof according to the statutory requisites (1925 REV. CIV. STAT., Art. 3344) is essential. *Tynan v. Paschal*, 27 Tex. 286, 84 Am. Dec. 619 (1863); *Allen v. Massey*, 236 S. W. 501 (Tex. Civ. App., 1921), affirmed 248 S. W. 1067 (Tex. Comm. App., 1923).

<sup>11</sup>*Johnson v. Brown*, 51 Tex. 65, 67, 80 (1879). (Will-contest on ground of forgery: on this issue evidence was admitted on behalf of contestants that testator declared that the purported legatees "should never have any of his property," also similar declarations after the date of the purported will. The declarations were all admitted as expressions of "feeling," but the first, if it is presumable that it was made before the date of the will, would be more directly admissible as a declaration of intention); WIGMORE, EVIDENCE, Sec. 112, n. 1, Sec. 1735; *Atherton v. Gaslin*, 194 Ky. 460, 239 S. W. 771 (1922). The leading case for the minority view to the contrary is *Throckmorton v. Holt*, 180 U. S. 552, 45 L. Ed. 663, 21 Sup. Ct. 474 (1901), which though quoted approvingly in *Rankin v. Rankin*, 105 Tex. 451, 151 S. W. 527 (1912), is disapproved in *Scott v. Townsend*, 106 Tex. 322, 332, 166 S. W. 1138, 1142 (1914). Dicta to the effect that declarations are never admissible to *prove* execution (e. g., *Allen v. Massey*, 236 S. W. 501, 504 (Tex. Civ. App., 1921); cf. *Kennedy v. Upshaw*, 64 Tex. 411, 418 (1885)) seem to be baseless except so far as they mean that such declarations do not dispense with the statutory requirements of proof by attesting witnesses, *supra* n. 8. But the declarations should be admitted, where for a purported will the statutory *prima facie* proof has been made, but the will has been attacked for forgery.

be admissible on the issue of whether the act of revocation ever took place.<sup>12</sup>

(b) *Declarations of feeling: affection, hostility, dissatisfaction.*

Declarations of intention (discussed in the next previous section) are frequently coupled with declarations expressing affection or the reverse for some one of the claimants. These declarations of *feeling* are admitted even more readily than declarations of intention. Their chief office is to show the *normal* emotions of the testator, favorable or the reverse, to particular claimants, and from this his probable normal desires and intentions as to giving property to such claimants by will. If such probable normal intentions are at variance with the actual terms of the purported will, the evidence tends to show and is admissible to show that the will was not executed by the testator,<sup>13</sup> or that it was executed by him when mentally incompetent,<sup>14</sup> or when under the pressure of undue influence,<sup>15</sup> or that the testator did not know the contents of the will but was induced to sign it through fraud.<sup>16</sup>

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<sup>12</sup>Gardner v. Gardner, 177 Pa. 218, 35 Atl. 558 (1896).

<sup>13</sup>Johnson v. Brown, 51 Tex. 65, 67, 80 (1879). (Will contested on ground of forgery: "After full consideration of the question in this case, we are of opinion that the declarations of J. W. Warren before and after the date of the proposed will, expressive of feelings of ill-will toward the beneficiaries, as were his feelings of kindness toward them, were properly admitted in evidence,—not, of themselves, as proof sufficient to overcome the testimony of the subscribing witnesses, but as a circumstance, in a case of this character, proper for the consideration of the jury in connection with all the other facts and circumstances in evidence; that they are not so much declarations disparaging a duly executed will, as evidence of an independent collateral fact—the state of feeling between the parties—and which would, in some degree, tend to prove the issue before the court"); Kennedy v. Upshaw, 66 Tex. 442, 445, 450, 1 S. W. 308 (1886) (will-contest, forgery: declarations by testator that he wanted to go to witness's house where he could have attention, because his daughter, legatee under purported will, did not come into his room when he was at her house, admitted).

<sup>14</sup>Robinson v. Stuart, 73 Tex. 267, 270, 11 S. W. 275, 276 (1889), (will-contest on grounds of mental incapacity and undue influence; letters written about two years before the will evincing hostility to one of the legatees and towards other persons were offered in their entirety: held, the letters would have been admissible if only those parts relating to the legatee had been offered).

<sup>15</sup>Robinson v. Stuart, *supra*; Scott v. Townsend, 106 Tex. 322, 166 S. W. 1138 (1914).

<sup>16</sup>Sockwell v. Sockwell, 166 S. W. 1188 (Tex. Civ. App., 1914). ("Some of the declarations referred to disclosed unfriendly feelings on the part of the testatrix toward the appellant, and a pronounced disinclination to bequeath to him any portion of her property. Such declarations, made at or about the time the instrument offered as a will was executed, are relevant and material in a contest charging fraud, as tending to show that the testator did not knowingly or willingly make the bequest. It is neither natural nor common for

While a declaration of specific intention, if offered to show that the particular intention was probably carried out, would, of course, have to precede the will, it seems clear that declarations either of intention or feeling when offered as stated above to show merely the usual, natural, *normal* testamentary desires of the testator, are admissible whether made before or after the alleged date of the execution of the purported will,<sup>17</sup> if within reasonable limits of time.<sup>18</sup>

(c) *Declarations Showing Illusions and Other Declarations Indicative of Mental Incapacity.*

Evidence of ravings and incoherent babblings by the testator would, of course, be relevant and admissible to show mental unsoundness. The hearsay rule would have no application because it is evidence of *conduct* not *statements*. It has been thought that *statements* of the testator which show illusions, such as the statement, "I own the world," are not hearsay either, because not offered to show the truth of the facts stated.<sup>19</sup> But an eminent writer<sup>20</sup> suggests that this is unsound in that the statement means "I *believe* that I own the world," and it is offered to prove that he did so believe, and hence rests for its value on the credibility of the declarant. But whether to be classified as evidence outside the scope of hearsay, or as hearsay admitted under an exception,<sup>21</sup> it is clear that declarations which from their apparently disordered, unreasonable, or abnormal character would be unlikely to be prompted by a sound mind are admissible to prove want of mental capacity.<sup>22</sup>

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testators to give their property to those toward whom they entertain hostile feelings. Those declarations were circumstances to be considered by the jury.")

<sup>17</sup>*Johnson v. Brown*, *supra*, n. 11. (In *Kennedy v. Upshaw*, *supra*, n. 11, the court says that declaration made *before* the will was admissible, but it did not appear that any *subsequent* declarations were offered.) Compare *Stubbs v. Marshall*, 54 Tex. Civ. App. 526, 117 S. W. 1030 (1909), and *Campbell v. Barrera*, 32 S. W. 724 (Tex. Civ. App., 1895), in which declarations after the will expressing dissatisfaction with it were admitted, on the issue of undue influence.

<sup>18</sup>See Section (f), *post*.

<sup>19</sup>WIGMORE, EVIDENCE, Sec. 228 (5).

<sup>20</sup>E. W. HINTON, CASES ON EVIDENCE, p. 703 note.

<sup>21</sup>The exception for declarations of present mental state. Would this admit evidence of the declarant's statement made in a lucid moment, "I am insane"?

<sup>22</sup>*McIntosh v. Moore*, 22 Tex. Civ. App. 22, 53 S. W. 611 (1899). (Issue as to sanity of testator at the time he destroyed his will. Evidence of testator's declaration that he didn't know anything about his marriage, that they hypnotized him, etc.: admitted); *Kennedy v. Upshaw*, 64 Tex. 411, 417 (1885), (*dictum*, as the issue was forgery); *Vance v. Upson*, 66 Tex. 476, 490, 1 S. W. 179 (1886). (Letters showing insane delusions were admitted in the trial



(d) *Declarations Bearing on Undue Influence in General.*

We have seen that declarations of *intention*, and statements showing the testator's *feelings* of affection or the reverse are admissible on the issue of undue influence. In addition to these, declarations avowing more directly the effect on the declarant's mind of the pressure exerted, or of the declarant's inability to resist such pressure from a particular quarter and all other declarations pointing to a mind deprived of its freedom by the dominance of another would be admissible.<sup>23</sup> Admissible, but not sufficient. Undue influence as an invalidating fact consists of two elements; first, the *external*, the words or acts of third persons which bring the pressure to bear; second, the *internal*, the collapse of the testator's own will, produced by such external conduct. It is held that declarations of the testator, of whatever type, are no evidence of the former but only the latter element.<sup>24</sup> It might be argued that the state of mental sub-

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court, but apparently on other issues than sanity; but Supreme Court holds the letters "bear conclusive evidence" of illusions.)

<sup>23</sup>*Stubbs v. Marshall*, 54 Tex. Civ. App. 526, 117 S. W. 1030 (1909). (Undue influence causing testator to make a new will changing a former disposition; declarations made frequently by the testator that the old will ought to stand; statements by testator promising sometimes and sometimes refusing to change the old will in face of his wife's threats to leave; declarations of dissatisfaction with the new will—all held admissible; opinion cites previous cases and gives examples of declarations admitted in outside decisions); *Scott v. Townsend*, 106 Tex. 322, 166 S. W. 1138 (1914).

<sup>24</sup>*Campbell v. Barrera*, 32 S. W. 724 (Tex. Civ. App., 1895). (Declarations by testatrix expressing dissatisfaction with the will: "As primary proof that the testatrix was influenced in making the will by fraud or compulsion, these declarations were inadmissible. In such relation they are regarded as hearsay. But, while they were not admissible to prove the actual fact of fraud or improper influence, they were competent to establish the influence and effect of the external acts (if any are shown) upon the mind of the testatrix herself. *Shailer v. Bumstead*, 99 Mass. 126; 2 WHART. EV., Sec. 1010; SCHOULER, WILLS, Sec. 243; *Mallery v. Young* (Ga.), 22 S. E. 143. We conclude, therefore, that the testimony should have been admitted. It may not be improper for us here to suggest that upon another trial it would be well for the trial judge to explain in his charge the purpose for which such declarations are admissible, and to restrict the jury in its consideration of such testimony to such purpose.") *Scott v. Townsend*, 106 Tex. 322, 335, 166 S. W. 1138, 1144 (1914). ("The alleged acts of undue influence or attempts to practice it, the attitude toward each other of parties affected by the will, and other matters of that kind, can no more be proved by recitals found in the testator's declarations than through the unsworn statements of any other third party.") *Marshall v. Campbell*, 212 S. W. 723 (Tex. Civ. App., 1919) (approving instructions to jury to consider the declarant's mental state); *Houston v. Norton*, 264 S. W. 231 (Tex. Civ. App., 1924), (declaration that certain beneficiaries wanted her to deed or will her property to one of them, but she did not want to do that, excluded by trial court; held no reversible error in view of absence of direct evidence of acts of coercion.) This principle is sometimes misconceived as limiting evidence of declarations to the issue of *mental capacity* (*Simon v. Middleton*, 51 Tex. Civ. App. 531, 540, 112 S. W. 441, 444



jection proved by the declarations is itself circumstantial evidence of some conduct causing that effect. To this it may perhaps be answered that the mental symptoms of the object of legitimate persuasion on the one hand and of the victim of illegitimate or undue acts of influence on the other, are so indistinguishable that the evidence is not of sufficient cogency to warrant its admission on the issue of the character of the *external* conduct. No doubt also the limitation flows partly from a judicial feeling that the claim of undue influence is one of such character as to require some substantial corroboration of the easily fabricated evidence of declarations of one deceased.

(e) *Declarations as to past happenings and external facts.*

The principle upon which testators' declarations in general have been admitted is the principle that declarations of the present mental state of the declarant came in as a special exception to the hearsay rule, the rule which excludes out-of-court utterances offered to prove their truth. Certainly declarations by the testator as to external happenings such as the acts of others, e. g., the misconduct of a disinherited son, would not be within this principle and would not be admissible if offered to prove the fact stated, i. e., the misconduct,—though it would, of course, be admissible to show the father's *feeling*. It is upon this basis that declarations bearing on undue influence are admissible in so far as they shed light on the stability or instability of the mind alleged to be influenced, but not as evidence of the coercive conduct.<sup>25</sup> Suppose, however, the declarant makes a statement as to *his own* past acts, as for example, a statement that he has or has not made, or has or has not revoked, a will. May evidence of such statements be admitted, not to reflect any mental state of the declarant but as bearing on the issue, did the *act* of making or revoking, take place? If it is so admissible, it must be upon the basis of a special hearsay exception for testators' declarations in will cases, for it is obvious that there is no general rule that statements

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(1908), but this is clearly an error. *Scott v. Townsend*, 106 Tex. 322, 333, 166 S. W. 1138, 1143 (1914).

<sup>25</sup>*Scott v. Townsend*, 106 Tex. 322, 166 S. W. 1138 (1914). (Undue influence; declaration: "She has been after me to make a will," *held* not admissible to show the acts of importunity because hearsay, and not admissible to show declarant's state of mind because not shedding any light on that); *Rankin v. Rankin*, 105 Tex. 451, 151 S. W. 527 (1912) (action to cancel deed on ground of fraud and undue influence, it being claimed that it was secured by misrepresenting to the grantor, since deceased, the terms of the instrument; *held*, that the declarations of the grantor made after the deed are inadmissible to prove the acts of fraud or undue pressure).

of declarants (or even of deceased declarants) as to their own conduct are admissible.<sup>26</sup> There is, in view of the peculiarly secret character of wills, of the practical impossibility of mistake by the testator as to the facts stated, and of the lack of pecuniary interest to deceive, a fairly strong showing of unusual reliability and need for the evidence and for such special exception—and it has been accepted in many states.<sup>27</sup> A contrary argument attacks the reliability of the statements on the ground that testators for the sake of peace and other purposes often deliberately deceive expectant beneficiaries as to these matters. On this ground many jurisdictions exclude the evidence.<sup>28</sup> Texas seems not to have definitely reached a final determination upon the question. However, in the leading case of *McElroy v. Phink*,<sup>29</sup> the Supreme Court held that a declaration by a testatrix whose will could not be found, but was last seen in the custody of another, that she had destroyed her will for the purpose of revocation, was admissible. In so holding the court used this reasoning which seems quite broad enough to support the admissibility of all testator's statements as to execution or revocation:

Two reasons are urged against the admissibility of such testimony: first, that it consists of mere declarations of one not a party to the suit and is, therefore, hearsay; and the second is that it opens a door to fraud and forgery. As to the latter, it is sufficient to say that we deem it of very little weight because, as we think, the same may be said of much other parol testimony the admission of which is never questioned. As to the first ground, the general rule is that the declarations of third parties are not competent evidence. But conceding, for the sake of the argument, that the declarations of a testator are prop-

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<sup>26</sup>It has been said, however, as an argument against admitting declarations of intention to show *later* acts of the declarant (*supra*, Sec. (a)), that declarations as to past conduct of the declarant are the more reliable, as the factor of uncertainty as to whether intentions will be carried out is eliminated. To which it is answered that the jury will give to the declaration of intention only the slight weight to which it is entitled, whereas the testimonial form of the declaration as to past acts is likely to cause them to treat it like evidence of an eye-witness on the stand. E. Seligman, "An Exception to the Hearsay Rule," 26 HARV. L. REV., 146; Z. Chafee, "Progress of the Law, Evidence," 35 HARV. L. REV., at 445; J. M. Maguire, "The Hillmon Case—Thirty-three Years After," 38 HARV. L. REV., 709.

<sup>27</sup>WIGMORE, EVIDENCE, Sec. 1736, n. 3 and 4; *Burton v. Wyld*, 261 Ill. 397, 103 N. E. 976 (1913); *Atherton v. Gaslin*, 194 Ky. 460, 239 S. W. 771 (1922); *State v. Nienwenhius*, 43 S. D. 198, 178 N. W. 976 (1920). Probably a slight preponderance of authority supports the admissibility of the evidence.

<sup>28</sup>WIGMORE, EVIDENCE, Sec. 1736, n. 2; *Throckmorton v. Holt*, 180 U. S. 552, 45 L. Ed. 663, 21 Sup. Ct. 474 (1901); *Moore v. Parks*, 122 Miss. 301, 84 So. 230 (1920); *Wells v. Wells*, 144 Mo. 198, 45 S. W. 1095 (1898).

<sup>29</sup>97 Tex. 147, 155, 76 S. W. 753, 754 (1903), rehearing denied, 77 S. W. 1025 (1904).

erly classed as declarations of a third party, the question presents itself, whether they ought not to be considered as standing upon a different basis and to be treated as an exception. Exceptions are made in other cases as to the declarations of deceased persons. For example, declarations as to pedigree and declarations made in the usual course of business by persons who have since died are admitted. The position of the testator is very different from that of an ordinary third person whose declarations may be offered in support of an issue upon the trial of a case. Both the proponent of the will and the contestant claim under him. As a very general rule he best knows the facts about which he makes the statement. His will is ambulatory and subject to be changed or revoked. No one has any right under it until his death. He has a right to make such disposition of his property as he may wish, and as a rule he has no interest to induce him to make a false statement about the matter.

In the same opinion the court interprets the early case of *Tynan v. Paschal*<sup>30</sup> as sanctioning the admission of evidence of declarations of the testator as to whether or not he had previously revoked a will where the will could not be found after his death.

The court also cites *Kennedy v. Upshaw*,<sup>31</sup> without expression of approval or disapproval. In that case upon the issue of whether a codicil offered for probate modifying a previous will was forged, a declaration made by the testator three days after the alleged date of the codicil, to the effect that he had not changed his will was held inadmissible. The holding was based upon the fear of opening the door to fraud and perjury by giving effect to oral declarations. Concededly, the declarations whether before or after would not *alone* be enough to establish *the making* of a will.<sup>32</sup> Apparently the decision in *McElroy v. Phink* would permit the evidence of the declaration alone to suffice to establish its *revocation*. Hence the argument based upon the danger of successful perjury is much stronger in the case of declarations offered to show revocation than when offered pro or con on the issue of forgery. Nevertheless, the court in *McElroy v. Phink*, where the issue was revocation, and the will was lost, and the revocation had no written memorial to support it, rejected summarily the argument based on the danger of fraud and perjury. It is believed that the cases admitting the evidence of declarations as to past acts on the issue of revocation and those rejecting it on the

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<sup>30</sup>27 Tex. 286, 84 Am. Dec. 619 (1863).

<sup>31</sup>64 Tex. 411 (1885).

<sup>32</sup>In view of the requirements of 1925 REV. CIV. STATS., Arts. 3344, 3345. Compare note 22, *supra*.



issue of the making of the will, cannot in reason stand together, and that to attempt to reconcile them is but to embalm a senseless inconsistency, a needless complexity, where simplicity and consistency should be the ideal. Such declarations should be admissible on both issues or neither, and the weight of reason, in my opinion, and by reason of its later date, the greater authority as a precedent, is with *McElroy v. Phink*. It is therefore suggested as the Texas rule, *that upon any issue of whether a will has been made, or whether a particular will is genuine or whether a will has been revoked, declarations of the testator made after the alleged date of making or revocation, stating or indicating<sup>33</sup> what his past acts in that respect have been, are admissible.*<sup>34</sup>

This, of course, does not serve to admit declarations of the testator as to past external happenings such as the acts or conduct of others than the testator, which declarations would not as a general rule have the same degree of reliability or be so essential a source of information as where the declarations relate to the declarant's own testamentary conduct.<sup>35</sup>

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<sup>33</sup>In *McElroy v. Phink*, *supra*, appears the following dictum: "When the declarations of an alleged testator consist in effect of the naked assertion that he has made a will, or that he has revoked one that is proved to have been executed, they are generally excluded; and we think such action is proper for the reason that such declarations are merely statements of a legal conclusion and not a statement of the facts from which that conclusion should be deduced."

This seems an unfortunate strait-jacket upon the form of such declarations, and it is hoped would not be followed. The rule as to the *form* of evidence with respect to conclusions, should obviously be less strict when applied to out-of-court declarations, than when applied to original narration of the witness. Compare the liberal rule as to dying declarations. *Couch v. State*, 93 Tex. Crim. Rep. 27, 245 S. W. 692 (1922). "I have made a will" would seem to be a proper "short-hand rendering" and should be *admissible*, e. g., on the issue of forgery, though, of course, standing alone, not *sufficient* to establish a will for probate. However, similar illiberal dicta are to be found in *Rape v. Cochran*, 217 S. W. 250, 251 (Tex. Civ. App., 1920), but the *decision* was that a declaration that declarant had "destroyed" her will was not objectionable.

<sup>34</sup>*McElroy v. Phink*, *supra*; *Tynan v. Paschal*, *supra*; *Rape v. Cochran*, *supra*, error refused; *Buchanan v. Rollings*, 112 S. W. 785 (Tex. Civ. App., 1908). All these are cases of alleged revocation of lost wills. Compare the curious case of *Rucker v. Carr*, 163 S. W. 632 (Tex. Civ. App., 1914), where the decedent had stated in a deposition that she had confided the custody of her will to a certain person, and the court held that this was admissible as a declaration, but the deposition not being entitled to be read as such, a reversal for this among other grounds was ordered.

<sup>35</sup>See *supra*, note 23.



(f) *Time of making declarations as affecting their admissibility.*

Declarations expressive of mental state (intention or feeling) or indicative of mental incapacity are only admissible so far as they purport to reveal the mental condition which obtains *at the time of the declaration*. But such declarations are seldom exactly contemporaneous with the operative act of executing or revoking the will, and it is only the condition which then obtains that is material.<sup>36</sup> Mental states existing prior or subsequent to that time, however, though not material, are circumstantial data which may, if sufficiently close in time, tend to show that the same condition existed at the moment of execution or revocation. This follows from the fact that the conditions inquired into—intention, affection, weakness—are conditions which *normally* though not always remain constant over considerable periods of time. But the usual duration of such periods varies according to the nature of the conditions inquired into, and according to the nature of the exciting cause so far as that is manifest in the circumstances proven. Therefore, the declaration must mirror a mental state which in the light of all the circumstances including proximity in time, has some probability of being the same condition which obtained at the time of the will's making or revocation. Or if the purpose is to show not that the same condition *did actually* obtain at the time of the operative act, but that it *normally and probably would have* except for an abnormal deflection produced by undue influence or insanity, the principle requiring reasonable proximity in time is the same. As in all instances where the inadmissible shades into the admissible according to relative degrees of probative force, the line between the admissible and the too remote being one that no two men would draw at exactly the same place, the admission of the evidence where there is room for doubt on this score should be left to the discretion of the trial judge.

Cases where this time element has been considered are listed in the note.<sup>37</sup>

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<sup>36</sup>*Rankin v. Rankin*, 105 Tex. 451, 456, 151 S. W. 527, 529 (1912). ("It must be the condition of her mind at the time of the transaction (delivery of deed) which is permitted to be proved, because such conditions at a different date could not throw any light on the transaction. The declarations made by Mrs. Rankin that a certain fact had been misrepresented to her at a previous time might be so extravagant as to show a disordered mind when she made the declaration, but could not prove her mental condition when the deed was made unless made so near to that time as to justify the inference that (it) existed at that time.")

<sup>37</sup>*McIntosh v. Moore*, 22 Tex. Civ. App. 22, 53 S. W. 611 (1899). (Mental incapacity: "The rule is well established that the declarations of a testator are

In conclusion, it may be seen that the Texas decisions leave it fairly clear that all declarations of the testator expressive of, or inferentially revealing a mental or emotional state then entertained by the testator are admissible if relevant to any issue in a will contest and not too remote in time. Less clearly, they indicate that probably all declarations of the testator as to his own past acts of making or revoking a will, are also admitted when similarly relevant. Whether it would not have been more practical to have said simply, that all testators' declarations are admissible when relevant, it is probably too late to ask.

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admissible to prove the condition of his mind at the time the will was made. In this case the condition of the alleged testator's mind during the period of time that his supposed will must be presumed to have been destroyed, from its nonproduction, after diligent search, subsequent to his death, is the subject of inquiry; and his acts and declarations made during and just prior to that period are admissible not as evidence of the truth of the facts stated by him, but as external manifestations of his mental condition. Such declarations ought to have some direct connection with, and tend to show, the condition of the mind at the time the supposed will was destroyed. But the period of time over which such declarations may extend depends much on the character of the unsoundness of the mind alleged to be proved. *SCHOULER, WILLS*, Sec. 193; 11 *Am. & Eng. Ency. Law* (1st Ed.), p. 156; *Kennedy v. Upshaw*, 64 Tex. 411. The character of unsoundness of the alleged testator's mind, sought to be established in this case, was such as may be brought about from the infirmities consequent to old age; and, in view of this, we do not think that the acts and declarations of Mr. McIntosh, testified to, were too remote from the time the will must have been destroyed by him, to be admitted as evidence of his mental condition at that time.") *Helsley v. Moss*, 52 Tex. Civ. App. 57, 113 S. W. 599 (1908), (declarations of testator's intention to devise property to contestant made fifteen years before the will was executed rejected as "too remote" on issues of undue influence and mental incapacity); *Jennings v. Jennings*, 212 S. W. 772 (Tex. Civ. App., 1919), (undue influence; conversation with testatrix twelve years before will made, irrelevant and too remote). Compare *Armistead v. Benefield*, 244 S. W. 391 (Tex. Civ. App., 1922), where a declaration was excluded apparently partly because its date was not shown, but chiefly because its was irrelevant.

## THE POWER OF THE EXECUTIVE TO SPLIT AN ITEM OF AN APPROPRIATION BILL

The Oklahoma State Legislature of 1923, in House Bill 485, approved April 9, 1923, provided for an appropriation for salaries for the State University, at Norman, Oklahoma, of \$700,000 for the year ending June 30, 1924, and \$700,000 for the year ending June 30, 1925. Drawing a line of red ink through said sums, the Governor wrote under each of the items these words:

Approved in the sums of \$500,000 only, \$500,000 only.  
J. C. Walton, Governor.

After reducing still other items of the bill in the same manner and disapproving other items in full, the Governor added these words:

Approved this ninth day of April, 1923, except as to items stricken and specifically disapproved and except as to the following items: Page 2, State University, Norman, salaries \$700,000. J. C. Walton, Governor of the State of Oklahoma.

Under the Oklahoma constitution,<sup>1</sup> the Governor clearly had the power to veto the bill in its entirety or each item<sup>2</sup> of the bill, but the precise question raised by this action was this: Did the Governor have power to split an item of an appropriation bill, or did his attempted reduction amount to a disapproval of these items as appropriated by the legislature?

As far as the state of Oklahoma was concerned, the answer was not to be long in forthcoming, because if the Governor's action amounted to an entire disapproval, or even a reduction of the original appropriation, it meant that the steady progress of the State University was to be hindered and delayed. A test case was instituted. Edith Perry, an employe of the State University, presented to the State Auditor a duly approved claim for salary. R. L. Peebly, a citizen and taxpayer of Oklahoma, brought suit in the District Court of Oklahoma County to restrain the State Auditor from paying out any moneys appropriated for salaries and maintenance for the State University for the years of 1924 and 1925 to satisfy the claim of the said Edith Perry. The State Auditor, through the Attorney General, demurred. At this stage of the proceedings the regents of the University of Oklahoma, a body corporate, filed a petition of intervention,

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<sup>1</sup>OKLA. CONST., Art. VI, Sec. 12.

<sup>2</sup>As to what constitutes an item, see *People v. Brady*, 277 Ill. 124, 115 N. E. 264 (1917).

and were, by order of the court, permitted to intervene and become parties to the suit. It then filed an answer to the suit "denying specifically that the acts of the Governor had any force and effect to reduce the amount of the item of \$700,000 appropriated for salaries for 1924, or in any manner whatever, and pleading specifically that the attempted reduction did not disapprove or affect the item of \$700,000 in any manner, and that the said item of \$700,000 as appropriated by the legislature, is available for the expenditure of moneys upon warrants approved by the regents of the University of Oklahoma." At the hearing upon the demurrer and pleadings, the court sustained the demurrer and denied the injunction prayed for. Plaintiff excepted and gave notice of appeal. On August 18, 1923, the Supreme Court handed down an opinion affirming the decision of the lower court, Mr. Justice Kane declaring: "That where the Governor attempts to approve in part and disapprove in part distinct items contained in an appropriation bill, such attempted disapproval is void and without effect, and such items remain valid enactments, as though the Governor had expressly approved them or allowed them to become law without his approval."<sup>3</sup>

Just four months prior to this decision, the same question was presented to the Supreme Court of Arizona for consideration.<sup>4</sup> The fact that the problem so recently thus presented itself in essentially the same form twice within the same year, to the highest courts of two states geographically widely separated and operating under different constitutions, indicates its growing importance, and invites and justifies a study of its origin and development.

But why is the problem just now assuming importance? Because the constitutional provisions under which the question has arisen constitute "a comparatively modern innovation in constitution making." The story of this development is both interesting and instructive, but it can only be properly understood in the light of the general history of the veto power and more particularly in the history of the development and non-development in our federal and state constitutions of the power of the executive to disapprove an item or items of an appropriation bill.<sup>5</sup> Although known at a much earlier date, the veto power first assumes importance to us as it appears in

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<sup>3</sup>*Peebly v. Childers*, 95 Okla. 40, 217 Pac. 1049 (1923).

<sup>4</sup>*Fairfield, State Auditor, v. Foster*, 25 Ariz. 146, 214 Pac. 319 (1923).

<sup>5</sup>For a detailed account of the history of the veto power, see the opinion in the case of *People v. Board of Councilmen of the City of Buffalo*, 20 N. Y. S. 51, 53 (Superior Court of Buffalo, 1892).



English history. Speaking of this development, an eminent jurist<sup>6</sup> said:

The veto power is a survival of the lawmaking authority vested in the king as a constituent if not a controlling third body of the parliament, in which he might and not infrequently did sit in person. With the growth of free ideas and institutions, and the aggressive spirit of the popular branch of parliament in the affairs of government, it lost its vitality as a real power in England, though it still exists in theory. But in the colonies it not only existed, but was an active power, absolute in character, and so constantly exercised that, as Professor Mason has aptly called attention to, the Declaration of Independence set forth first among the grievances of the colonies, "He has refused his assent to laws most wholesome and necessary for the public good." Veto Power, Sec. 7.

Frequent contests between the Colonial Governments and the British Crown over the refusal of assent to acts of the various assemblies caused the veto power to be looked upon with distrust by the framers of our state and national constitutions. But despite this prevalent spirit of distrust, the veto power, with various limitations, found a place in the federal constitution and in practically all state constitutions. Under the provision found in the federal constitution,<sup>7</sup> the President must approve or disapprove an appropriation bill in its entirety. The power to disapprove separate items of appropriation bills has never been given to the President of the United States. Commenting on this fact, a recent text-writer<sup>8</sup> said:

Extensive as the veto power is, there is yet one particular which, in the opinion of many publicists, it might profitably be extended. That is, a constitutional amendment might give the President the authority to disapprove of any particular part or item of a bill which may appear to him objectionable. At present, the chief magistrate must act upon the "bill" as a whole. An appropriation bill or a revenue measure may consist of a great number of separable items, some of which, in the judgment of the executive, may be unconstitutional or inexpedient. Yet

<sup>6</sup>Mr. Justice Mitchell, in *Commonwealth v. Barnett*, 199 Pa. St. 161, 48 Atl. 976, 55 L. R. A. 882 (1901).

<sup>7</sup>Art. I, Sec. 7, Cl. 2.

<sup>8</sup>BLACK, *CONSTITUTIONAL LAW*, 3rd Ed., Secs. 67-68; see also BURDICK, *THE LAW OF THE AMERICAN CONSTITUTION*, p. 83, where it is said: "President Grant, in his annual message of December 1, 1873, recommended an amendment to the constitution permitting the President to veto part of a bill without vetoing all of it. This recommendation was not acted upon by Congress, but the agitation for such a change in the constitution continues, and such an amendment is most desirable. A number of our state constitutions contain such a provision."

he must either approve or reject the entire act. He has no power to veto any individual item.

It follows that the specific problem presented by the Oklahoma and Arizona cases<sup>9</sup> cannot arise under the federal constitution without an amendment. Quite naturally the territories and states imitated the provision in the federal constitution, hence in many of the organic acts and early state constitutions the veto power was limited to the approval or disapproval of the entire bill as presented. The operation of this qualified veto power was well illustrated by an early case in Arizona.<sup>10</sup> Experience, however, soon proved that provisions similar to that contained in the federal constitution and involved in the case of *Porter v. Hughes*,<sup>11</sup> were inadequate, at least as far as state constitutions were concerned. Referring to this experience, Mitchell, J., said:

By joining a number of different subjects in one bill the Governor was put under the compulsion to accept some enactments that he could not approve, or to defeat the whole, including others that he thought desirable or even necessary. Such bills, popularly called "omnibus bills," became a crying evil, not only from the confusion and distraction of the legislative mind by the jumbling together of incongruous subjects, but still more by the facility they afforded to corrupt combinations of minorities with different interests to force the passage of bills with provisions which could never succeed if they stood on their separate merits. So common was this practice that it got a popular name, universally understood, as "log-rolling." A still more objectionable practice grew up, of putting what is known as a "rider" (that is, a new and unrelated enactment or provision) on the appropriation bills, and thus coercing the executive to approve obnoxious legislation, or bring the wheels of the government to a stop for want of funds.<sup>12</sup>

In an effort to eliminate these undesirable practices, provisions calculated to increase the power and scope of the Governor's veto were incorporated into most state constitutions shortly after the Civil War. These provisions assumed various forms,<sup>13</sup> but most important were those granting to the Governor power to veto separate items of appropriation bills, thus enabling the executive to object to ex-

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<sup>9</sup>*Peebly v. Childers*, note 3, *supra*, and *Fairfield, State Auditor, v. Foster*, note 4, *supra*.

<sup>10</sup>*Porter v. Hughes*, 4 Ariz. 1, 32 Pac. 165 (1893).

<sup>11</sup>*Ibid.*

<sup>12</sup>*Commonwealth v. Barnett*, note 6, *supra*.

<sup>13</sup>See the summary of the Pennsylvania view, at page 192.

penditures of money for a specified purpose and amount, without having to refuse to agree to another expenditure approved by him. It was this provision which constituted "a comparatively modern innovation in constitution making," and it was under this extension of the veto power that the problem presented by the Oklahoma and Arizona cases has arisen. This problem will be viewed from two angles: First, has the Governor power to split an item of an appropriation bill under any of the types of existing constitutional provisions? Second, irrespective of constitutional provisions, as a matter of sound governmental policy, should such power be vested in the executive? As to the first angle of the problem, there are at least three views, varying in greater or less degrees with the particular type of constitutional provision under construction.<sup>14</sup>

#### HAS THE GOVERNOR POWER TO SPLIT AN ITEM OF AN APPROPRIATION BILL UNDER ANY OF THE EXISTING TYPES OF CONSTITUTIONAL PROVISIONS?

##### *The Pennsylvania View*

In the course of the argument of the Oklahoma case,<sup>15</sup> the Assistant Attorney General told the Supreme Court that "the Governor, in attempting to reduce the items, acted upon advice he had received that there was authority for his attempted reduction in a case decided in Pennsylvania."<sup>16</sup> The case referred to was that of *Commonwealth v. Barnett*,<sup>17</sup> decided in 1901, which, with a case decided in 1913 in Wyoming,<sup>18</sup> constitute the only decisions supporting the view. The facts in the first case were these: The general appropriation bill was approved by the Governor on May 13, 1899, Section 8 of which reads as follows:

For the support of the public schools of this commonwealth for the two years commencing on the first day of June, 1899, the sum of eleven million dollars, to be paid on warrants of the superintendent of public instruction in favor of the several school districts of the commonwealth; provided, that the city of Philadelphia shall be entitled to a proper portion of this appropriation, and out of the amount received by the city of Philadelphia

<sup>14</sup>These three views are stated in *Fairfield, State Auditor, v. Foster*, note 4, *supra*.

<sup>15</sup>*Peebly v. Childers*, note 3, *supra*.

<sup>16</sup>Taken from the brief submitted in behalf of the Regents of the State University, Intervener.

<sup>17</sup>Note 6, *supra*.

<sup>18</sup>*State v. Forsyth*, 21 Wyo. 359, 133 Pac. 521 (1913).

there shall be paid the sum of three thousand dollars to the Teachers' Institute of that city; the sum of three thousand dollars to the Philadelphia School of Design for Women for their corporate purposes, and the sum of ten thousand dollars to the Teachers' Annuity and Aid Association of said city; provided further, that warrants for the above, and all other unpaid appropriations for common school purposes, shall be issued in amounts designated by the State Treasurer, and whenever he shall notify the superintendent of public instruction, in writing, that there are sufficient funds in the state treasury to pay the same.

The Governor approved such items of appropriation to the extent of \$10,000,000 and disapproved \$1,000,000 thereof. By way of explanation the Governor, in his veto message, said:

The authority of the Governor to disapprove part of an item is doubted, but several of my predecessors in office have established precedents by withholding their approval from a part of an item and approving other parts of the same item. Following these precedents, and believing that the authority which confers the right to approve the whole of an item necessarily includes the power to approve part of the same item, I therefore approve of so much of this item which appropriates \$5,000,000 annually, making \$10,000,000 for the two years beginning June 1, 1899.

One John P. Elkin, through the Attorney General, to the use of the school district of Patton, sued out a writ of mandamus against James Barnett, State Treasurer, on the ground that the Governor did not have power to split the item of \$11,000,000 and thereby reduce the sum appropriated for the use of the public schools. The lower court gave judgment for the defendant, and the plaintiff appealed, so that in the Supreme Court the issue was whether the Governor, under the constitution, had the power to split an item of an appropriation bill.

The constitutional provision under construction in the Pennsylvania case is precisely the same in effect as that in the Wyoming case,<sup>19</sup> later to be considered, and may be used as a model for both. It reads as follows:

The Governor shall have power to disapprove of any item or items of any bill, making appropriations of money, embracing distinct items, and the part or parts of the bill approved shall be the law, and the item or items disapproved shall be void, unless repassed according to the rules and limitations prescribed for the passage of other bills over the executive veto.<sup>20</sup>

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<sup>19</sup>Note 18, *supra*.

<sup>20</sup>CONST. PA., Art. IV, Sec. 16.



The argument in favor of the majority view that the constitution conferred upon the Governor the power to disapprove of part and approve of part of the same item was delivered by Mr. Justice Mitchell,<sup>21</sup> who, in substance, said:

The Governor is an integral part of the lawmaking power of the state. Section 15 of Article 4 of the constitution provided that "every bill which shall have passed both houses shall be presented to the Governor; if he approve he shall sign it, but if he shall not approve he shall return it with his objections<sup>22</sup> to the house in which it shall have originated," and no bill, therefore, can become law without first being submitted to the Governor for his approval or disapproval. His disapproval, commonly known as a "veto," is essentially a legislative act, limited to negation or concurrence, and not creative in effect. This being true, the presumption is that, within its limited sphere of negation, the power applies to every branch and subject of the bill to which the powers of the two houses apply. Originally, the veto power was confined to approval or disapproval of the entire bill as presented, but this was found to be inadequate. The legislature, in framing and passing a bill, had full control over every subject and every provision that it contained; and the Governor, as a co-ordinate branch of the law-making power, was entitled to at least a negative of the same extent. But by joining a number of subjects in one bill, the Governor was compelled to accept some enactments that he did not approve, or defeat the whole bill. These bills were done away with by the amendment of 1864 to the constitution that no bill should contain more than one subject which should be clearly stated in title. But appropriation bills were excepted, it being deemed necessary to permit appropriation bills containing distinct items embracing different subjects. The present constitution met this difficulty by providing that general appropriation bills should embrace nothing but appropriations for the ordinary expenses of the executive, legislative and judicial departments of the commonwealth, interest on the public debt, and for public schools; that all other appropriations should be made by separate bills embracing one subject; that the Governor should have power to disapprove of any item or items of any appropriation bill.<sup>23</sup> These provisions recognized the legislative character of the Governor's part in the passage of bills, and increased the power and scope of the veto. . . . It was clear that the words "item" and "part" as used in Article IV, Section

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<sup>21</sup>For most part the exact words are quoted, but for purposes of brevity, in some places the wording has been slightly changed.

<sup>22</sup>"By 'objections' or 'disapproval,' is meant lawful objections or disapproval within the authority of the Governor, and expressed in the manner provided by the organic law." *State v. Forsyth*, note 18, *supra*.

<sup>23</sup>The full constitutional provision is quoted, page 187, *supra*.

16, are used interchangeably and in the same sense.<sup>24</sup> This is apparent from the plain purpose of the section. In ordinary bills the single subject is a unit which admits of approval or disapproval as a whole, without serious inconvenience, even though some of the details may not be acceptable. But every appropriation, though it be for a single purpose, necessarily presents two considerations equally material, namely, the subject and the amount. The subject may be approved on its merits, and yet the amount disapproved,<sup>25</sup> as out of proportion to the requirements of the case. The legislature had full control of the appropriation in both its aspects and the plain intention of this section was to give the Governor the same control as to disapproval over each subject and each amount. A contrary construction would destroy the usefulness of the constitutional provision. If the legislature, by putting purpose, subject and amount inseparably together, and calling them an "item," can coerce the Governor to approve the whole thing, then the old evil is revived which this section was intended to destroy.

As incidental supports to his main argument, Mr. Justice Mitchell stated that if any other construction was placed on the provision under consideration, there would be no appropriation at all for the support of the public schools, and hence another express provision of the constitution which required an appropriation of "at least one million dollars a year" would be violated.<sup>26</sup> He also pointed out and emphasized that the practice adopted by the Governor was not new, but had been followed by other Governors.<sup>27</sup>

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<sup>24</sup>Such construction, it will later be pointed out, is inconsistent with the result reached by the court.

<sup>25</sup>This was precisely the case in *State v. Forsyth*, note 18, *supra*, wherein the Governor of Arizona expressly approved of some appropriation for the use of the State Geologist's Department, but disapproved as to the amount that was necessary to meet its requirements.

<sup>26</sup>This argument was adequately met in Mr. Justice Mestrezat's dissenting opinion by the statement that the Governor could have vetoed other items of the appropriation bill, thus keeping within the limits set by the constitution, and preserving the appropriation of "at least one million dollars a year" for the support of the public schools.

<sup>27</sup>The court said: ". . . While the executive interpretation of his own powers is not binding on the judiciary, it has always been considered as persuasive and entitled to great respect. And where, as in this instance, the practice has been frequent and acquiesced in without objection for a number of years, it should be very clearly shown to be unconstitutional to justify the courts in declaring against it." *Commonwealth v. Barnett*, note 6, *supra*. But see the opinion of Potter, J., in the case of *State v. Forsyth*, note 18, *supra*, in which he declares: "But judicial opinions differ concerning the effect, as an aid to interpretation, of the former practice of executives, no matter how long continued, in assuming and exercising a veto power, when the right is once questioned. That was considered in the case of *May v. Topping*, 65 W. Va. 656, 64 S. E. 848, where it was held, under the constitution of West Virginia, that after the Legislature had adjourned the Governor is

The view thus adopted has found support in but one other decision.<sup>28</sup> The case arose in Wyoming under a similar constitutional provision. The legislature, among other items, appropriated \$15,000 for the contingent expenses of the State Geologist's office. The Governor stated over his official signature: "This act is approved save and except the item or parts of items specially noted herewith as being disapproved and as shown by accompanying communication," and on the margin of an item appropriating \$15,000 for the contingent expenses of the State Geologist's office was noted: "\$10,000 of item approved; \$5000 of item disapproved. J. M. C., Governor." In his communication to the Secretary of State appended to the enrolled act the Governor stated that he approved of so much of the item as "appropriates \$10,000" and withheld his approval from \$5000, leaving the appropriation of \$10,000. The relator presented to the State Auditor a bill and voucher in due form. The Auditor refused a warrant, whereupon the relator sued out a writ of mandamus against the Auditor. The Auditor demurred, thus raising an issue of law as to the effect of the act of the Governor in approving a part of an item of an appropriation bill and disapproving the remainder of that item. The relator contended, regardless of whether the Governor had authority to veto a part of a distinct item, that there had been at least \$10,000 appropriated for the contingent expenses of the State Geologist's office. The State Auditor contended that the Governor's authority to reduce an item had been questioned, and hence it was doubtful whether his action had resulted in (a) destroying the entire appropriation; (b) in an appropriation by law of the amount as reduced by the Governor; (c) or in an appropriation by law of the amount as passed by the legislature.

The court, after discussing various decisions, observed that there seemed to be a division of judicial opinion respecting the power of the Governor to "disapprove part of an item under a constitutional provision authorizing him to disapprove an item or items, or part

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without authority to disapprove of an appropriation bill, or of items therein, but must so act, if at all, before adjournment, and communicate his disapproval, with his reasons therefor, to the house in which the bill originated. Answering the argument that it had been the custom to approve appropriation bills, or to disapprove some item therein, within five days after an adjournment of the Legislature, and that such custom had never been questioned, the court said: 'Such custom, if it has existed as alleged, has been directly contrary to the constitutional provision. . . . The rule of contemporaneous or practical construction is sought to be invoked. . . . The rule cannot be applied to overthrow an unambiguous mandate of the law. . . . That the section has not hitherto received such interpretation and use is not reason why it should not in the future.'

<sup>28</sup>State v. Forsyth, note 18, *supra*.



or parts, of an act appropriating money," that some of the grounds applicable in Pennsylvania were not applicable in Wyoming, and that the practice of former executives, relied on as an argument in the Pennsylvania case, was against the existence of the power in Wyoming, and that there was a difference of opinion as to the effect of such practice, finally declaring:

So far, therefore, as a determination of the right of the Governor to disapprove part of a distinct item may depend upon authorities, the question appears to be at least a doubtful one. But the conclusion we have reached renders it unnecessary to determine that matter. . . .

Then, apparently oblivious of the statement just quoted, the court argued in the following fashion: That since it was clear that the Governor had the power of approval, there was at least \$10,000 appropriated; that it was equally clear that if the power was not conferred on the Governor to thus disapprove of a part of an item and approve a part, the action of the Governor would be null and void, and the entire amount appropriated would be available; that the appropriation bill in question might have become a law without the affirmative approval of the Governor, under Article IV, Section 8, of the constitution, and hence any item not disapproved would become part of the law; that the action of the Governor could not be construed as an objection or disapproval of the entire item, but on the contrary, a holding that his action amounted to a disapproval of the entire item, would distort his language in explaining his approval or disapproval. The court then said:

If he was without authority to thus split the amount appropriated by that item in the act, then to say that by doing so he has disapproved the entire item would be to give effect to an invalid act and permit it to accomplish the purpose of a disapproval, without which the appropriation would become law. If the authority to disapprove an item in part and approve it in part is not conferred upon the Governor his act in attempting to do so would be a nullity, and necessarily ineffectual for the purpose intended, or any other purpose, for, being unauthorized, it would be void, and entitled to no consideration whatever. The effect would be the same, necessarily, we think, as if no such partial disapproval, or other disapproval, had been attempted. Either the Governor's signature to the bill would stand without any qualification as to such item, or the item would have force without approval because not disapproved.

The court then referred to the *Regents of State University v.*



*Trapp Case*,<sup>29</sup> where, under the constitution, an affirmative approval was essential to the bill becoming a law, and the approval, being a qualified one, and unauthorized in that form, it was held not to amount to an approval at all within the meaning of the constitution, and ineffectual for any purpose. Commenting on this conclusion, the court declared:

If that be true, we think the same reasons require it to be held that where an affirmative approval is not required, but the bill or items contained therein will become law unless disapproved, an unauthorized disapproval will be ineffectual. Conceding that where an approval is required to give the act force as law, words qualifying the approval showing a purpose to approve it only in part will nullify the approval and render it ineffectual, it does not, we think, reasonably follow that similar words qualifying an approval and showing a purpose to disapprove in part will amount to a disapproval of the entire bill, nor is an item in it affected by the attempted disapproval, where such partial disapproval is unauthorized by the constitution, and the bill or the particular item would become a law unless disapproved.

For the reasons stated, the court concluded that there was at least \$10,000 appropriated for the contingent expenses of the State Geologist's office.

It is clear that the Pennsylvania and Wyoming decisions take the position that, under their particular type of constitutional provision, the Governor does have the authority to split or reduce an item of an appropriation bill.<sup>30</sup>

### *The Oklahoma View*

Probably the Oklahoma doctrine had its origin in the case of *State v. Holder*,<sup>31</sup> but as ultimately developed it is largely the product of three local decisions.<sup>32</sup> The constitutional provisions around which these decisions have centered are Article VI, Section 11, which reads as follows:

Every bill which shall have passed the Senate and House of Representatives, and every resolution requiring the assent of both branches of the legislature, shall, before it becomes a law, be

<sup>29</sup>28 Okla. 83, 113 Pac. 910 (1911).

<sup>30</sup>As to the soundness of these opinions, see the comparison of the Pennsylvania, Oklahoma and Texas views, *infra*, p. 199, et seq.

<sup>31</sup>76 Miss. 158, 23 So. 643 (1898); see also *Miller v. Walley*, 122 Miss. 521, 84 So. 466 (1920).

<sup>32</sup>*Regents of the State University v. Trapp*, note 29, *supra*; *Carter v. Rathburn*, 85 Okla. 251, 209 Pac. 944 (1922); *Peebly v. Childers*, note 3, *supra*.

presented to the Governor; if he approve, he shall sign it; if not he shall return it with his objections to the house in which it shall have originated, who shall enter the objections at large in the Journal and proceed to reconsider it. If, after such reconsideration, two-thirds of the members elected to that house shall agree to pass the bill or joint resolution, it shall be sent, together with the objections, to the other house, by which it shall likewise be reconsidered; and if approved by two-thirds of the members elected to that house, it shall become a law notwithstanding the objections of the Governor. In all such cases, the veto in both houses shall be determined by the yeas and nays; the names of the members voting shall be entered on the Journal of each house, respectively. If any bill or resolution shall not be returned by the Governor within five days (Sundays excepted) after it shall have been presented to him, the same shall be law in like manner as if he had signed it, unless the legislature, by their adjournment, prevent its return, in which case it shall not become a law without the approval of the Governor. No bill shall become a law after the final adjournment of the legislature without the approval of the Governor;

Article VI, Section 12, which provides:

Every bill passed by the legislature, making appropriations of money embracing distinct items, shall, before it becomes a law, be presented to the Governor; if he disapproves the bill, or any item, or appropriation therein contained, he shall communicate such disapproval, with his reasons therefore, to the house in which the bill shall have originated, but all items not disapproved shall have the force and effect of law according to the original provisions of the bill. Any item or items so disapproved shall be void, unless repassed by a two-thirds vote, according to the rules and limitations prescribed in the preceding section in reference to other bills; provided, that this section shall not relieve emergency bills of the requirement of three-fourths vote;

and Article V, Section 57, which reads:

Every act of the legislature shall embrace but one subject, which shall be clearly expressed in its title, except general appropriation bills. . . .

The first case to arise under these provisions was that of the *Regents of the State University v. Trapp*,<sup>33</sup> decided in 1911. The first section of the bill appropriated \$295,810.23 for the support and maintenance of the State University, and the second section divided the appropriation into distinct and separate parts, indicating for what purpose they were to be used. The bill was presented to the Gov-

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<sup>33</sup>Note 29, *supra*.

ernor less than five days before the final adjournment of the legislature. The Governor, within fifteen days after the final adjournment, reduced several of the items as appropriated by the second section, and as thus reduced, approved the bill. The Board of Regents sued out a writ of mandamus to compel the State Auditor to issue a warrant on the State Treasurer on certain approved claims. They contended that the Governor's authority to veto the bill was given in Article VI, Section 11, *supra*, under which an affirmative approval was essential to a bill becoming a law; that under Section 12 no affirmative action on the part of the Governor was necessary to give vitality to an appropriation bill containing distinct items; that the bill itself contained but one item, hence Section 11 requiring an affirmative approval was applicable; that under that section the unauthorized attempt on the part of the Governor to approve part and disapprove part did not amount to an approval, with the result that the bill never became law. And so the court held.<sup>34</sup> The question as to the Governor's authority to split an item was mentioned, but was passed over as not being essential to the decision of the case.

The next case was that of *Carter v. Rathburn*,<sup>35</sup> decided in 1922. Among other items of an appropriation bill, the legislature appropriated \$1500 for each of two years to pay the salary of a clerk in the State Examiner's office. The bill was sent to the Governor less than five days before the adjournment of the legislature. After the legislature adjourned, the Governor disapproved the \$1500 appropriated for each of the two years, and approved the bill as to all other items. The bill containing distinct items, the Governor's power of veto in connection therewith was covered by Article VI, Section 12, under which all items not disapproved became law. It was contended on the part of the relator that the Governor's action did not constitute a disapproval, because not performed while the legislature was still in session. Despite the fact that Article VI, Section 12, was taken from the constitution of West Virginia, and that in the case of *May v. Topping*,<sup>36</sup> where the same point was in issue, the West Virginia Supreme Court decided that the Governor's power of disapproval must be exercised before the final adjournment of the legislature, the Supreme Court of Oklahoma denied the writ of mandamus, and held that, although the case was not expressly covered by the provisions of the constitution, the disapproval after adjournment would prevent the bill from becoming law, "not because the Governor

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<sup>34</sup>But see criticism of this position under "The Texas View," *infra*, p. 197.

<sup>35</sup>Note 32, *supra*.

<sup>36</sup>65 W. Va. 656, 64 S. E. 848 (1909).

had disapproved this item after adjournment of the legislature, but simply because it has not become a law as required by the provisions of the constitution."

The final development came in the case of *Peebly v. Childers*,<sup>37</sup> the question in issue being whether Section 12 authorized a qualified disapproval at all, it being immaterial whether the legislature was in session or not. It will be recalled that in *Carter v. Rathburn*<sup>38</sup> the question was whether "Section 12 authorized the unqualified disapproval of an item after the final adjournment of the legislature," the court holding that it did. It will also be remembered that under Section 12, an appropriation bill containing distinct items would become law if not disapproved, no affirmative act on the part of the Governor being necessary as under Section 11. The court held that the action of the Governor in attempting to approve in part and disapprove in part distinct items of the bill was an unauthorized act, and ineffectual as a disapproval, and hence the bill became law.

To summarize, the Oklahoma view comes to this: Where an appropriation bill containing but one item, Section 11, which requires an affirmative approval for a bill to become law, applies, and hence a qualified approval is a nullity. Where an appropriation bill contains several separate and distinct items, Section 12, which requires a disapproval within fifteen days after the final adjournment in order to prevent a bill from becoming law, applies, and an unqualified disapproval is effectual. On the other hand, a qualified approval, such as an approval and disapproval in part of distinct items, is null and void, and of no force and effect, hence the bill involved stands as law, just as it would have stood in the absence of an unqualified disapproval, no affirmative action being required under Section 12 to vitalize the bill.<sup>39</sup>

The California case of *Lukens et al. v. Nye*<sup>40</sup> should be noticed because it represents a variation in the type of constitutional provision involved. In the California constitution<sup>41</sup> the provisions as

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<sup>37</sup>Note 3, *supra*.

<sup>38</sup>Note 32, *supra*. The dissenting opinion by Elting, J., in the writer's opinion, represents the best law.

<sup>39</sup>Other decisions supporting this view are: *State v. Holder*, 76 Miss. 158, 23 So. 643 (1898); *Miller v. Walley*, 122 Miss. 521, 84 So. 466 (1920); *Lukens v. Nye*, 156 Cal. 498, 105 Pac. 593, 36 L. R. A. (N. S.), 244, 20 ANN. CAS. 158 (1909); *Fulmore v. Lane*, 104 Tex. 499, 511, 140 S. W. 405, 1082 (1911); *Callaghan v. Boyce*, 17 Ariz. 433, 153 Pac. 773-783 (1915); *Fergus v. Russel*, 270 Ill. 304, 110 N. E. 130, 131, ANN. CAS. 1916 B, 1120 (1915); *Fairfield v. Foster*, 25 Ariz. 146, 214 Pac. 319 (1923).

<sup>40</sup>156 Cal. 498, 105 Pac. 593, 20 ANN. CAS. 158 (1909).

<sup>41</sup>CONST., Art. IV, Sec. 16.



to the veto power are contained in one single section and embrace provisions making the general method of veto applicable to appropriation bills containing distinct items. But the result reached in construing this provision is the same as that reached by the Oklahoma Supreme Court in construing Sections 11 and 12, that is, that the Governor has no power to disapprove of part of an item. Referring to the Governor's power in this respect, the court stated:

In the case of a bill containing several items of appropriation of money, he may approve one or more of them, and object to the others. In no other case is he empowered to modify or change the effect of a proposed law, or to do anything concerning it, except to approve or disapprove it as a whole. . . . Any attempt on his part to attach to his approval any qualification, or to withhold his consent to a part of the law and give it to other parts, will either be entirely nugatory and ineffectual and leave the approval absolute, or it will completely nullify the approval and operate as a veto of the whole bill.

#### *The Situation Under the New York Constitution*

In the course of the argument submitted in the brief in favor of the regents of the University of Oklahoma, interveners, in the case of *Peebly v. Childers*,<sup>42</sup> attention was called to the fact that in the annotations to Section 12, Article VI, Oklahoma constitution, Williams Edition, it was stated that several of the provisions incorporated into the section under construction were taken from the provisions of the New York constitution concerning the veto power.<sup>43</sup> This raised the question as to whether the power to split an item of an appropriation bill had been conferred upon the Governor of New York. Some indication as to what view would be taken if the problem was squarely presented to the New York courts for decision can be secured by a reference to the constitutional history of the state. Apparently no case<sup>44</sup> directly involving the Governor's authority to reduce an item has ever arisen under Article XIV, Section 9, which provides:

If any bill presented to the Governor contains several items

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<sup>42</sup>Note 3, *supra*.

<sup>43</sup>Art. XIV, Sec. 9.

<sup>44</sup>But see the case of *People v. Bowen*, 21 N. Y. 517 (1860), affirming 30 Barb. 241, holding that the Governor's action in vetoing a bill is essentially legislative, and indicating that his exercise of the power must be kept strictly within constitutional limits.

of appropriation of money, he may object to one or more of such items while approving of the other portion of the bill.<sup>45</sup>

This section, under which the issue would arise, if at all, was not adopted until 1874. At the time of its disposal, 1872, some of the members of the Constitutional Commission favored the idea of giving the Governor power, not only to veto an item of an appropriation bill, but also to split or reduce an item. Conservatism prevailed and the veto power was not so extended,<sup>46</sup> hence under the New York provision, as under the Oklahoma provisions, it is submitted that the Governor can only disapprove an item as an entirety, or permit it to become law. It should be noted, however, that there is this distinction between the constitutional provisions involved in the Oklahoma constitution and that involved in the New York constitution: That under the Oklahoma constitution the power of the Governor to veto bills in general is covered by Section 11, *supra*, and the power to veto items of an appropriation bill is given by Section 12, *supra*, whereas, under the New York constitution, as under the California constitution, the general method of veto as applied to ordinary bills and the particular method as applied to appropriation bills, are contained in a single section,—a distinction in form rather than substance.

### *The Texas View*

The Texas view represents a variation from the doctrine laid down in the *Regents of State University v. Trapp Case*.<sup>47</sup> The leading Texas authority is *Fulmore v. Lane*.<sup>48</sup> In that case the legislature

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<sup>45</sup>Only the pertinent parts of the section are quoted; a distinction between the New York and Oklahoma constitutional provisions will be pointed out in the context.

<sup>46</sup>Lincoln in his Constitutional History of New York, Vol. II, pp. 519-20, says: "Governor Hoffman, in his message of 1872, said that the 'veto power needs to be made more effectual. . . . The seed sown in the late convention (the convention of 1867) was bearing fruit. The time was now manifestly ripe for this extension of the veto power. In the Constitution Commission, Mr. Tracy presented a plan, under which the Governor might veto any part of a bill carrying an appropriation, although the appropriation might be incidental to the main purpose of the bill. The power was almost as broad as that proposed to be conferred on the Governor by the Committee on Executive in the late convention. Later, Mr. Tracy modified his plan by limiting the proposed veto power to separate items in appropriation bills, and as thus modified, the plan was accepted and recommended by the Commission.'" The recommendation, in the form of an amendment, was adopted as a part of the New York constitution in 1874.

<sup>47</sup>Note 29, *supra*.

<sup>48</sup>104 Tex. 499, 140 S. W. 405, 1082 (1911); note 39, *supra*.

had passed a bill, the pertinent features of which were substantially as follows:

ATTORNEY GENERAL'S DEPARTMENT

For the years ending  
Aug. 31, 1912. Aug. 31, 1913.

For the support and maintenance of the Attorney General's Department (here setting out the purposes for which the money was to be expended), there is hereby appropriated the sum of eighty-three thousand and one hundred and sixty (\$83,160) dollars, to be expended during the two fiscal years ending August 31, 1912, and August 31, 1913, to be paid by the Treasurer on warrants drawn by the Comptroller upon vouchers approved by the Attorney General. . . . \$41,580 \$41,580

The constitution of Texas provides:<sup>49</sup>

. . . If any bill presented to the Governor contain several items of appropriation, he may object to one or more of such items, and approve the other portion of the bill. In such case he shall append to the bill, at the time of signing it, a statement of the items to which he objects; and no item so objected to shall take effect. . . . If, on reconsideration, one or more of such items be approved by two-thirds of the members present of each house, the same shall be a part of the law, notwithstanding the objections of the Governor. . . .

While the legislature was still in session, the Governor sent to the Senate and House of Representatives a message which contained the following language:

. . . I have exercised this prerogative, nevertheless, and vetoed the lump sum of \$83,160 appropriated to the Attorney General's Department. After making this lump appropriation in one item, the legislature divided the same into two items of \$41,580 each for the fiscal years ending August 31, 1912, and 1913, respectively. By striking out the lump appropriation and the words describing the same, and the appropriation of \$41,580 for the second year, the sum of \$41,580 is left subject to the use of the Attorney General.

A majority of the court held that the appropriations of \$41,580 for each of the two years were separate items, within the meaning of the constitutional provisions previously quoted. Mr. Justice Ram-

<sup>49</sup>CONSTITUTION OF TEXAS, Art. IV, Sec. 14.

sey dissented on the ground that the entire appropriation for two years constituted a single item, and that it could not be disapproved in part and was not disapproved in its entirety and consequently the bill stood as passed by the legislature.

The Texas view finds support in cases since decided in South Carolina and Illinois.<sup>50</sup> In the latter case the legislature appropriated in a lump sum \$153,150 to aid the State Agriculture Board and other kindred organizations. The bill then specified forty-four separate purposes, and opposite each purpose a specific amount was set. The Governor treated these amounts as items and vetoed several of them. The counsel for the Board of Agriculture contended that "the Governor had no power to veto the items in question on the ground that the only distinct item of the appropriation was the whole amount of \$153,150, and what followed was only an apportionment of that item or a direction how it should be used." Attention was specifically directed to the Oklahoma case, where, on essentially the same fact basis, the Supreme Court of Oklahoma held that there was but one item. Despite the view expressed in the *Trapp Case*, the court held that the amounts set aside for specific purposes constituted distinct items within the meaning of the Illinois constitution. Referring to the result reached in the Oklahoma case, the court said:

If the bill in that case can be regarded as of the same character as the one under consideration we could not justify such a conclusion under our constitution, which provides that bills making appropriations shall appropriate to the specified objects and purposes, respectively, their several amounts in distinct items and sections. The general appropriation of the total sum specifies no purpose or object, but declares that the sums appropriated are to be used for the purposes thereafter named. The general appropriation, without the following items, would not be in compliance with the constitution, and to hold that it was the only distinct item would be to nullify the power given by the constitution to the Governor to withhold his approval from distinct items.<sup>51</sup>

#### *Comparison of the Pennsylvania, Oklahoma and Texas Views*

The doctrine as presented by the Pennsylvania and Wyoming cases is subject to several criticisms. In general, it may be said that both cases illustrate the nature of the judicial process, that is, of how a

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<sup>50</sup>*State v. Jones*, 99 S. C. 89, 82 S. E. 882 (1914); *People v. Brady*, 277 Ill. 124, 115 N. E. 204 (1917). See ILL. CONST., Art. V, Sec. 16.

<sup>51</sup>That aside from the question as to what constitutes an "item" the Illinois Supreme Court holds with the Supreme Court of Oklahoma, see *Fergus v. Russel*, note 39, *supra*.



court determines in advance in its own mind what is the desired result, and then searches for some logical or at least plausible argument to support and justify the result attained.<sup>52</sup> The writer is impelled to take this view because the opinions in both cases leave out of consideration any argument based upon the express wording of the constitutional provisions involved. In a recent case it was said that the real ground upon which the Pennsylvania case was decided was on the peculiar wording of Article IV, Section 16, Const. Pa.,<sup>53</sup> Mr. Justice Kane, declaring:

A close analysis of the opinion in the Pennsylvania case discloses that the ruling of the court was based upon this provision (Art. IV, Sec. 16) of the constitution, where, as construed by the court, the word "item" and "part" are used interchangeably and in the same sense. As thus construed, to hold that the Governor may approve in part and disapprove in part separate items of an appropriation bill does no violence to the language used in the constitutional provision.

Is it true that to so hold "does no violence to the language used in the constitutional provision"? Mr. Justice Mitchell,<sup>54</sup> in defining the terms in question, said:

The language is, "The Governor shall have power to disapprove of any item or items . . . and the part or parts of the bill approved shall be the law, and the item or items of the appropriation disapproved shall be void," etc. It is clear that "item" and "part" are here used interchangeably and in the same sense. If any special or different meaning was attached to the word "item" the natural mode of expression would have been to use that word throughout the section; but for the sake of euphony, and to avoid the repetition of the same words three times in the same sentence, the draftsman used the word "parts" as an evident synonym.

If these terms are used "interchangeably and in the same sense," then "part or parts" has identically the same meaning as "item or items," and hence the use of the expression "part or parts" cannot be construed to extend the Governor's veto power. To make the point clearer, let us substitute the term "item or items" in the original provision wherever we find the term "part or parts." So substituting, the provision reads:

The Governor shall have power to disapprove of any item or

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<sup>52</sup>See "THE NATURE OF THE JUDICIAL PROCESS," by Mr. Justice Cardozo.

<sup>53</sup>*Peebly v. Childers*, note 3, *supra*.

<sup>54</sup>*Commonwealth v. Barnett*, note 6, *supra*.

items . . . and the item or items of the bill approved shall be the law, and the item or items of the appropriation disapproved shall be void. . . .

Reading the provision as thus modified by Mr. Justice Mitchell's own definition of the terms involved, the phrase "part or parts" cannot logically be construed to authorize the Governor to veto a part of an item, but only "part or parts," which means an "item or items" of an appropriation bill. Indeed, this was the view of the dissenting justice, who, in speaking on this same point, said:

The part or parts of the bill composed of entire items, and not the part or parts of entire items, he may approve, and thus make them law. In other words, the executive has authority to select such of the many items contained in a general appropriation bill as he may desire, and disapprove them, and the parts of the bill embracing separate and entire items which he approves shall be the law.<sup>55</sup>

It appears to the writer that under Mr. Justice Mitchell's definition of the terms in question, all argument on the express wording of the constitution was precluded, and that the assumption of Mr. Justice Kane that the result in the Pennsylvania case did "no violence to the language used" was unwarranted. In this respect the Wyoming case<sup>56</sup> was little improvement. Instead of placing its decision on the constitutional provision involved, it goes to the other extreme and apparently relies on the wording of the Governor's veto message.<sup>57</sup> Mr. Justice Mitchell seemed to sense that he could not place his argument on the peculiar wording of the constitution. His opinion reads as if written by one who was struggling in a darkness through which he could not see. He argued that any other construction than the one he contended for would result in the violation of another constitutional provision and leave the public schools without funds, he gave undue emphasis to the practice of former executives, and finally grounded his decision on the only possible remaining basis—that is, of policy. Briefly put, the argument on policy amounted to this: That since the obvious intention of the framers of the constitution was to give the Governor the power to control appropriations to the same extent as controlled by the legislature, the court should

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<sup>55</sup>Mr. Justice Mestrezat, in *Commonwealth v. Barnett*, note 6, *supra*.

<sup>56</sup>Note 18, *supra*.

<sup>57</sup>The court said: "It is evident that the Governor did not intend to veto or disapprove the entire item of the appropriation made for the contingent expenses of the office of the State Geologist, and that he did not by his endorsement upon the bill, or his communication appended to it, express disapproval of the entire item." *State v. Forsyth*, note 18, *supra*.

hold that the Governor had such power, even in the face of the fact that, granting it was the clear intention of the constitution framers to confer such power, they had not successfully or clearly expressed their intent. This course, it should be noted, ignored certain well settled rules of constitutional construction applicable to such a case. The first of these has been authoritatively expressed in *Field v. People*,<sup>58</sup> by Chief Justice Wilson, who said:

In deciding this question (power of the Governor), recurrence must be had to the constitution. . . . The constitution is a limitation upon the powers of the legislative department of the government; but it is to be regarded as a grant of powers to the other department. Neither the executive nor the judiciary, therefore, can exercise any authority or power except such as is clearly granted by the constitution. . . .

Under this rule, Mr. Justice Mitchell should have shown a clear grant of power to the Governor, not only to veto an item, but also a part of an item. Not only did he fail to do this, but he made such a construction impossible by the very definition he himself placed upon the terms involved. Had he, by his definition, construed the term "part or parts" as giving the Governor power to veto part of an item, rather than as being used "interchangeably and in the same sense" as the term "item or items," he could have argued logically that the constitution did grant the Governor power to split an item. Having closed the gate to this avenue of escape, he was forced to ignore the express wording of the constitution and take the position that it was the intention of the framers of the constitution to confer this power on the Governor, and hence such intent should be carried out. This, the writer submits, violates another rule of construction, which has been stated as follows:

While it is the duty of the courts to ascertain and carry into effect the intent and purpose of the framers of a constitution, this intent must be that which they have embodied in the instrument itself. To ascertain the meaning of a constitution, therefore, the first resort in all cases is to the natural signification of the words used, in the order and grammatical arrangement in which the framers have placed them.<sup>59</sup>

Resorting to the "natural signification," Mr. Justice Mitchell found that the terms were used in the same sense as in other constitutions, and hence, under this rule of construction, he had no right to allow what he apparently knew to be the intent of the framers, though

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<sup>58</sup>3 Ill. 79 (1839).

<sup>59</sup>12 C. J. 703-705, par. 47.

inadequately expressed, to enter into his decision. It follows that the main argument that the Governor should be held to have the power to veto part of an item because it was so intended by the framers of the constitution falls to the ground.

An attempt by counsel in *Peebly v. Childers*<sup>60</sup> to distinguish the Pennsylvania doctrine on the theory that the Governor's veto power in Oklahoma was not legislative failed when the court held:

While engaged in considering bills which have passed both houses of the legislature, and which are presented to him for approval or disapproval, the Governor is acting in a legislative capacity and not as an executive.

It is submitted that the court was correct in repudiating the idea that the function of the Governor in vetoing a bill is not essentially legislative in character, nor was it necessary to distinguish the cases and support the view adopted. The Supreme Court of Oklahoma placed its decision squarely on the express wording<sup>61</sup> of Article VI, Section 12, holding that the word "item" as used therein did not confer on the Governor authority to veto part of an item. Tested by strict logic, this is the result that should have been reached under the Pennsylvania constitution, and such, indeed, was the position taken in the dissenting opinion. No time, therefore, should have been wasted by the Supreme Court of Oklahoma in distinguishing the case of *Commonwealth v. Barnett*.<sup>62</sup>

The Texas view calls for no criticism, as it follows the Oklahoma view, once there is an agreement as to what constitutes an item. That is, granted you have an appropriation bill containing distinct items, under the Texas view, the Governor has no power to split an item; he must veto it in its entirety or not at all. The point of departure lies in what constitutes an item. In the case of *People v. Brady*,<sup>63</sup> the first part of the bill appropriated a lump sum for the use of the State Board of Agriculture, and the second part apportioned the appropriation to certain specified objects and purposes. In a case similar to this<sup>64</sup> the Oklahoma Supreme Court took the view that there was but one item, but the Illinois Supreme Court

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<sup>60</sup>Note 3, *supra*.

<sup>61</sup>"Attempts are generally made to base the decision on the precise language of the particular constitution construed, but a careful examination . . . will disclose that the conclusion is usually based on the view the particular court takes as to the general nature of the veto power." . . . *Fairfield v. Foster*, note 4, *supra*.

<sup>62</sup>Note 6, *supra*.

<sup>63</sup>Note 2, *supra*.

<sup>64</sup>*Regents of State University v. Trapp*, note 29, *supra*.



took the position that there were as many items as there were distinct parts apportioned for specific purposes, the court defining an item as follows:

The word "item" is in common use and well understood as a separate entry in an account or schedule, or a separate particular in an enumeration of a total which is separate and distinct from the other particulars or entries, and the items vetoed by the Governor come within that meaning.<sup>65</sup>

If this definition of the term "item" be accepted, it is submitted that the result reached in the Oklahoma case<sup>66</sup> is erroneous, and if followed to its logical conclusion will render entirely nugatory the provision of the constitution giving the Governor authority to veto particular items. If we follow the line of reasoning there laid down, the legislature, merely by making an appropriation in a lump sum, followed by directions limiting its application to specific purposes, which may be highly injurious to the welfare of the state, may practically compel the Governor to abandon the veto power entirely, or suspend governmental operations.<sup>67</sup>

From the foregoing, the writer concludes that under none of the existing types of constitutional provisions concerning the veto power, does the Governor have the authority to split or reduce an item of an appropriation bill, that an attempted reduction does not amount to a disapproval, and hence such items remain in force and effect.

IRRESPECTIVE OF CONSTITUTIONAL PROVISIONS, AS A MATTER OF  
SOUND GOVERNMENTAL POLICY, SHOULD THE POWER TO SPLIT  
AN ITEM BE VESTED IN THE EXECUTIVE?

The courts have advanced several reasons why the power to split an item of an appropriation bill should not be conferred upon the Governor. Thus, for example, it has been suggested that to confer such power would turn the Governor's veto power into a creative power, violate the doctrine of the separation of powers, and allow the executive to determine the amount to be appropriated, limited only by the maximum set by the legislature. This idea was well

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<sup>65</sup>People v. Brady, note 2, *supra*.

<sup>66</sup>Regents of State University v. Trapp, note 29, *supra*.

<sup>67</sup>For an excellent statement of the argument against the view adopted in the Trapp case, see Fairfield v. Foster, note 4, *supra*, the court finally summing up its conclusion in the following words: "I am decidedly of the opinion that the reasoning of the Trapp case and any others like it, is utterly untenable on any theory of construction consonant with the plain purpose of the constitution."

expressed in the dissenting opinion in *Commonwealth v. Barnett*,<sup>68</sup> when Mr. Justice Mestrezat said:

The practical operation of such a construction would be to annul Section 1 of Article 2 of the constitution, which provides that "the legislative power of this commonwealth shall be vested in a general assembly." It is well known that most of the appropriation bills are passed upon by the Governor after the legislature has adjourned, and consequently after it has had an opportunity to repass the bills over his disapproval. He could, therefore, under the authority claimed by the respondent, determine the amount of every appropriation by reducing the various items embraced in general appropriation bills. This is solely a legislative function, under the constitution, which in no form is granted to him in that instrument. It places the legislature in the position of being able to fix the maximum of an appropriation to any object, subject, however, to the will of the Governor whether he will permit the members of that body to exercise their judgment as to the amount of the item appropriated. Such was clearly not the intention of the people who adopted the constitution.

This objection is not serious and might be answered by saying that there would be no violation, because the Governor, when vetoing a bill, is acting as a part of the legislative machinery.

Another objection is that the liberties of the people might be endangered. This argument was summed up in the dissenting opinion of Mr. Justice Ramsey in *Fulmore v. Lane*,<sup>69</sup> as follows:

An effort was made in argument to sustain the Governor on the theory that under the constitution he has the right to reduce any part of an item. To this contention and claim we can never give our assent. If this were conceded, then it would be within the power of the Governor to reduce any appropriation where the amount sought to be appropriated was not fixed in the constitution. It would authorize, in respect to the health department, to the Comptroller's Department, our educational institutions, our eleemosynary institutions, and every department of the state government, that the Governor, when the legislature had properly passed on the matter and probably adjourned, might reduce and tear down the appropriations made for the administration of the affairs of the state in such a way as to beggar and bankrupt all of them and to deny the representatives of the people of the state, the legislature duly assembled, any authority or participation whatever in the money bills of the commonwealth. Such a proposition involves such intolerable tyranny and hurtful usurpation as not to be entertained for one moment.

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<sup>68</sup>Note 6, *supra*.

<sup>69</sup>104 Tex. 499, 140 S. W. 405, 1082 (1911); note 39, *supra*.

But these objections seem more apparent than real. The real question is not whether, in so extending the veto power, the doctrine of the separation of powers will be violated and the liberties of the people endangered; it is not even whether it can be done, because it has been done, and that without any of the dire consequences predicted;<sup>70</sup> the real problem is whether, as a matter of sound governmental policy, the Governor should be given the power to split an item of an appropriation bill. Aside from constitutional provisions, the writer submits that there is no rule of law which will govern the solution of this problem, that it is rather a question of the science of government. In making this decision, the real issue will be: Which type of provision will be the most workable, the type limiting the veto power to particular items or the type extending it to parts of items? And it should be here observed that this will depend, in a large measure, not upon the inherent character of the provision adopted, but upon the sound political sense and judgment of the state in which the provision is placed in operation. This statement is borne out by the fact that in Pennsylvania, where they have construed the provision in question as authorizing the Governor to reduce items, no difficulty has been experienced. At the same time, in other states, such as Oklahoma and Arizona, where they have held that the Governor did not have such a power, the results have been equally satisfactory. Once the question of policy is determined, the important thing is to see that the provision to be incorporated into the constitution, whether in favor of or against the Governor's power to split an item in an appropriation bill, clearly and adequately expresses the intention of the framers. If the power extends only to particular items, courts should not seek to enlarge the power, as was done in Pennsylvania, by a doubtful process of judicial construction; on the other hand, if the power does not extend to parts of items, it should be expressed so as to leave no doubt and so as to remove all necessity for construction.

In conclusion, the following observations may be made:

1. That under none of the existing types of constitutional provisions involved is there any logical justification for holding that the executive has authority to split or reduce an item of an appropriation bill.
2. That an attempted reduction does not amount to a disapproval, hence the item sought to be rejected remains in full force and effect.
3. That the Pennsylvania and Wyoming courts, in holding that

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<sup>70</sup>*Commonwealth v. Barnett*, note 6, *supra*; *State v. Forsyth*, note 18, *supra*.

under their constitutional provisions the Governor does have the power to split an item, have placed a strained construction on the somewhat peculiar wording of the provisions involved,—a construction not even consistent with the Pennsylvania court's own definition of the terms in question.

4. That the question of whether, irrespective of constitutional provisions, the Governor should have the power to split an item of an appropriation bill, is essentially a question of policy in governmental affairs; that once determined, the important thing is to see that the framers of constitutions clearly and adequately express their intention so as to avoid the necessity for judicial construction.

5. That in the final analysis, the problem as to whether either type will work well depends, not on the character of the provision nor the clarity of expression used in its construction, but upon the political sense and judgment of the people of the state in which it is adopted.

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## SUGGESTIONS FOR IMPROVING COURT PROCEDURE IN TEXAS

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Under this general heading will appear from time to time pertinent suggestions for improving and speeding up our judicial machinery. Our readers are invited to send in for publication in this department brief, concrete suggestions, or discussions of suggestions made by others. Communications for this department should be sent to Mr. A. H. McKnight, M. K. & T. Ry. Building, Dallas.—ED.

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The Texas Bar Association will hold its next annual meeting at Texarkana, April 22, 23 and 24, 1926. The Bar Associations of Louisiana and Arkansas will meet at the same time and place. The three Associations will have separate sessions for the transaction of their business, but in addition they will join in presenting a general program which promises to surpass anything of the kind ever given in the Southwest, if, indeed, anywhere in the United States.

This will be the first time in the history of bar associations that the associations of three states have joined in a meeting. Two state associations have joined in such meetings several times, but never three.

The Program Committee, of which Mr. W. H. Arnold of Texarkana is Chairman, are not yet ready to announce the program, but the speakers will be men of note and the whole entertainment and fellowship, including the banquet on the last night, will be such as to make the occasion a memorable one.

An effort will be made to have the Judges of both the Trial and the Appellate Courts either adjourn their courts for the time of the meeting, or, at any rate, so adjust their business as to make it convenient for all the lawyers who wish to attend the meeting to do so. The day preceding the meeting will be a legal holiday—San Jacinto Day—and the day following will be Sunday. Lawyers from all parts of the State, therefore, can attend the meeting without consuming more than three business days.

Texarkana is easily accessible by rail and those who wish to drive through in automobiles will find good roads. The people of that city are as hospitable as can be found anywhere, and during the meeting they will have but one aim, namely, to make the stay of the visiting lawyers and their families pleasant and altogether delightful.

## PROCEDURAL REFORM

All admit that our court procedure is chaotic, and that it is so hampered by constitutional provisions and legislative restrictions that an ideal system of procedure is unattainable, unless and until such provisions and restrictions are removed. Nevertheless, ideals are obtained only after someone has seen a vision or dreamed a dream, which is made to evolve into a reality.\*

A great sculptor passing the ruins of an ancient Temple saw an angel sitting in a large, unshapely block of marble and proceeded to chisel it out; even so, we may see in our cumbrous rules of procedure a beautiful and idealistic method of obtaining approximate and speedy justice, if we can so skillfully wield the sculptor's chisel as to transform the marble into a thing of beauty.

Waiving, for the present, how far we may proceed under the provisions of the constitution with the plan of procedure here suggested, I suggest that the judiciary article thereof be reduced to a simple provision, patterned after the corresponding provision of the Federal constitution, somewhat as follows:

"The judicial power of the state shall be vested in one supreme court and in such inferior courts as the legislature may, from time to time, ordain and establish; and possessing such powers and jurisdiction as the legislature may prescribe." (Art. III, Sec. 1.)

The substitution of such provision for the judiciary articles of the

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\*The beauties and simplicity of pleading undoubtedly appealed to Justice Grier of the Supreme Court of the United States when he expressed his admiration for same in the following excerpt from the Court's opinion:

"Had this case been conducted on the principles of pleading and practice known and established by the common law, a short declaration in *assumpsit*, a plea of *non assumpsit*, and *non assumpsit infra sex annos*, would have been sufficient to prepare the case for trial on its true merits. But, unfortunately, the District Court has adopted the system of pleading and code of practice of the state courts; and the record before us exhibits a most astonishing congeries of petitions and answers, amendments, demurrers, and exceptions—a wrangle in writing extending over *more than twenty pages*, and continued *nearly two years*—in which the true merits of the case are overwhelmed and concealed under a mass of worthless pleadings and exceptions, presenting some fifty points, the most of which are wholly irrelevant, and serve only to perplex the court, and impede the due administration of justice. The merits of the case, when extricated from the chaos of demurrers and exceptions in which it is enveloped, depend on two or three questions, simple and easily decided. We do not deem it necessary, therefore, to inquire whether the court below may have erred in their decision of numerous points submitted to them, which have no bearing on the merits of the case, and are of no importance to the just decision of it. It will be unnecessary to decide whether the judge erred in his construction of the laws of Africa! and other questions of a similar character, provided it shall appear that, on the admitted facts of the case, he should have instructed the jury that the defendant had established no just defense to the plaintiff's action."

constitution would relieve the necessity of resorting to such questionable makeshifts and subterfuges as "Commissions of Appeals," "Committees of Judges," etc., as well as abate the nuisance of frequent conflicts between the constitution and legislation on questions of jurisdiction.

With this simple constitutional provision, the Legislature (as the Congress has done), could be relied upon to create a suitable system of courts and prescribe their jurisdictions, as the exigencies of the occasion might require, just as it now creates trial courts for the various districts, as well as commissions and committees.

Under the provisions of the present constitution, the supreme court could prescribe necessary rules of procedure, if it were not hamstrung by restrictive legislation. (Art. V, Sec. 25.) If such were the law, a rule of court should provide that where a suit is brought in a court not having jurisdiction over the parties or the subject matter, it should not be dismissed, as is now the practice, but should be transferred to a court of competent jurisdiction, as is the practice in questions of venue; and the pendency of such suit should prevent the operation of the statute of limitations from and after the filing thereof.

Our system of pleading, in the main, is very good, consisting as it does of detailed statements of the contentions of the parties to the controversy, but it might be greatly simplified.

The necessity of an officer serving parties with pleadings and amendments, notice of intention to take depositions, and such like matters, should be dispensed with; but the parties, or their attorneys of record, or any competent person for them, should serve same (in the absence of agreement of the parties) somewhat as is now the practice in serving a party beyond the limits of the state.

All pleadings, all interrogatories to take depositions and the answers thereto, and all other papers constituting the record proper, should be filed in duplicate (besides the copies served upon the adverse party), and should be typewritten or printed on paper of prescribed style, quality, and size, with lines consecutively numbered on the margin for easy reference,—one copy to be used in the usual way, and the other copy to be compiled in chronological order of filing, in a suitable folder, to which should finally be added all the documents read or offered in evidence (except where copies of same appear elsewhere in the record, in which case a mere reference to same would be sufficient) and all objections to same (but not the arguments of counsel thereon), with the court's rulings thereon and



the exceptions to their admission or exclusion; and all oral evidence, in question and answer form, with all objections to same, as well as all objections to depositions and the answers thereto and the court's rulings thereon (permitting the parties by agreement to shorten any evidence by omitting portions not deemed essential or to reduce same to narrative form or a mere statement of the facts proved), and all should be written or printed on paper similar to that prescribed in the foregoing; and, when agreed to by the parties or certified by the clerk, should constitute the record on appeal.

The parties should be given the right to require security for costs, and provisions should also be made for supersedeas of judgments upon proper security; but all should be informal and not jurisdictional.

In trials before the court and a jury, all matters of fact not otherwise submitted to and passed upon by the trial court should be submitted to it in a motion for new trial, in order to be available on appeal.

Where there is necessity for more than one judge of the superior trial court in a county, there should be but one court and the requisite number of judges to dispose of the business, all having common dockets and exercising a common jurisdiction, and operating under the general supervision of a presiding judge; and all terms of court should be abolished and provisions made for default judgments to be taken before the clerk on fixed rule days, where service has been had the requisite length of time and where no appearance has been made or answer filed.

Appeals should be taken by giving the adverse party notice thereof and filing the record in the court of appeals or the supreme court; but if the appeal should be to the wrong court, such court should transfer the case to the court having jurisdiction of the cause, by a simple order and transmission of the record thereto.

To avoid confusion of nomenclature, the style of a cause should never be changed; but throughout all the courts to which a cause should be appealed, the plaintiff should be called "Plaintiff" and the defendant should be called "Defendant."

If a cause should be appealed from the court of appeals to the supreme court, such appeal should be perfected by service of notice thereof and by transmitting the record of the cause to the supreme court,—to which record should be added copies of the proceedings of the court of appeals, and a succinct statement of the grounds



upon which the supreme court is thought to have jurisdiction of such appeal.

Formalities in appeals should be abolished, and the courts should be relieved from the necessity of searching the record for any purpose, except to verify statements in the briefs, where the contents of the record are in dispute among the parties and where the page and line citations to the record are given in the briefs.

Where no briefs are filed for either party, the cause should be affirmed as matter of course; but if briefs should be filed by only one party the statements therein contained from the record, as well as all uncontroverted statements from the record contained in either brief, should be taken and considered as correct.

The form of the briefs (other than their style and make-up), should be left optional with the party preparing same, and should be considered sufficient, if questions of law, or question of fact, or questions of law and fact, within the jurisdiction of the appellate court, are presented. If a party fails in his effort to cause the court to see his point, he would lose his cause as a natural consequence; but if the court should see the point, by whatever means discovered, it should decide such point—always subject to the limitation that the court should not be required (but would have the right) to search the record further than might be necessary to enable it to verify the contention of one of the parties upon a material, controverted issue.

The appellate courts should be admonished to refrain from long discussions of well established principles of law; and either omit them altogether, or content themselves with merely citing the authorities relied upon as establishing the principles announced. All lawyers have the books; why copy them in opinions?

In submitting the foregoing suggestions, I am not unmindful of the natural conservative disposition of the profession and their reluctance to adopt the untried. I realize that we do not usually care to be "the first by whom the new is tried," but we surely should not aspire to be "the last to lay the old aside."

It is well known that up to about fifty years ago our English Brethren of the Profession were so conservative that one was reminded of "Old Ceaser Casm" (called "Old Sarcasm"), who did not hesitate to condemn a prisoner to death for blowing his nose upon the sidewalk; but, under no circumstances, would consent to dispense with the necessity of alleging in the indictment in which hand the culprit held the offending nose. Nothing in the foregoing suggestions is more radical than the changes wrought by the English Bar,

as it were, overnight; and, besides, the English practice permits the filing of additional pleadings and amendments, even on appeal, to sustain a judgment.

If the foregoing suggestions appear radical, may we not, nevertheless, hope that from such suggestions, we may "Sow a Thought and reap an Act."

"Time to us this truth has taught,  
( 'Tis a treasure worth revealing)  
More offend from want of thought  
Than from any want of feeling."

*C. S. Bradley.*

Groesbeck.

# TEXAS LAW REVIEW

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PUBLIC LECTURES.—During the week of March 22 to 26, Prof. Edson R. Sunderland of the University of Michigan School of Law will deliver at the University of Texas a series of lectures dealing with modern procedural problems. Prof. Sunderland has for many years been recognized as one of the foremost authorities on American Procedural Law. His writings and lectures have given much impetus to the nationwide movement for the simplification of the administration of justice. He spent the summer of 1924 and the following half year on leave in England studying at first hand the modern English system of procedure. His lectures will be given at 8 o'clock p. m. and will be open to the public. His subjects are:

A Century of Law Reform in England, Monday, March 22.  
Modern English Practice, Tuesday, March 23.  
The Problem of Jurisdiction, Wednesday, March 24.  
The Problem of Trying Issues, Thursday, March 25.  
The Problem of Appellate Review, Friday, March 26.

WHAT PROTECTION HAS A LANDOWNER AGAINST A TRESPASS WHICH MERELY DESTROYS THE SPECULATIVE VALUE OF HIS PROPERTY?—In *Humble Oil & Refining Company v. Kishi*<sup>1</sup> the plaintiff, Kishi, owned all the surface and three-fourths of the mineral rights of a fifty-acre tract of land. Lang owned one-fourth of the mineral rights. After the expiration of a lease given by both parties the oil company entered and drilled a well with the consent of Lang, but against the consent of Kishi who insisted that the lease had expired. The oil company claimed that the lease was still in force. An oil and gas lease on the tract was found to be reasonably worth in the market \$1000.00 per acre at the time of the entry. A dry hole as a result of the operations rendered the lease valueless. Kishi sued for \$3000 per acre damages, but the trial court, while holding the entry wrongful, allowed nominal damages only. The Court of Civil Appeals reversed and remanded the case, holding that the lease having expired before entry, plaintiff could recover the value of his interest but that the proof was insufficient.<sup>2</sup> The Commission of Appeals approved the holdings of the Court of Civil Appeals on all points, except this court held the evidence sufficient to show the damages and, reversing the judgment below, it rendered judgment for plaintiff for \$37,500.00.

The court said:

Oil in place under the land is real estate. The exclusive right to enter upon the land, drill wells thereon, and remove therefrom the oil to exhaustion . . . is a property right which the law protects. The Humble Oil & Refining Company, wrongfully claiming to own this right over the protest of Kishi, and excluding him therefrom, entered upon his 50 acres of land for the purpose of drilling the well. This was clearly a trespass and ouster. This right had a market value of \$50,000.00, being \$1,000.00 per acre. . . . The Humble Oil & Refining Company insists that it should not be required to pay as damages Kishi's proportionate share of the market value of this leasehold interest, because it entered upon the land in good faith, believing that its lease had not expired. Though it did so in good faith without any intention to injure Kishi, it asserted a right it did not have. This right at the time it was wrongfully asserted had a market value. Had the oil company acquired this right by purchase before its entry, the presumption of law is that it would have been required to pay the market value therefor. . . .

Is there any theory upon which this decision can be supported?

There are four theories upon which it might be urged that plaintiff could maintain an action:

First: An action in ejectment or trespass to try title plus damages for withholding possession and for injuries done the land.

Second: An action for damages for trespass (*quare clausum fregit*).

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<sup>1</sup>276 S. W. 190 (Tex. Comm. App., 1925).

<sup>2</sup>261 S. W. 228 (Tex. Civ. App., 1924).



Third: An action on the case in the nature of slander of title.

Fourth: An action based upon a supposed right of plaintiff to be free to bargain with respect to his property without having its value disclosed as a result of a wrongful act.

The first action would be primarily for possession to vindicate plaintiff's title and incidentally for damages for withholding possession and any injury done the land. Such an action will lie to protect the mineral interest in land,<sup>3</sup> unless the interest be held under a lease granting merely a license under which possession has not been taken.<sup>4</sup> In this state the nature of the lease would be immaterial<sup>5</sup> and the estate being a corporeal one a lessee could maintain it as well as the owner of the entire fee. Plaintiff would be entitled to recover the possession, the value of the use of the premises and any actual damages done to the land.<sup>6</sup> Damages for loss of opportunity to rent are not recoverable,<sup>7</sup> nor are speculative profits.<sup>8</sup> Plaintiff was not given recovery for the value of the use of the premises nor for any injury done the land. He recovered the consequential loss of market value by reason of the disclosure that there was no oil in his land. His loss, aside from the technical trespass, was merely of a chance to sell at a high price.

The court seems to have considered the case a simple suit for trespass and ouster, and the facts seem to warrant such theory. But it went far beyond any case of its kind in giving damages for a decrease in market value pending the conflict in claims. The case is only one of many which arise in the development of every oil field. Values are highly speculative and land valuable today is worthless tomorrow. The usual remedy employed by a landowner is injunction, on the theory that no adequate remedy exists at law.<sup>9</sup> Development is so greatly valued by our courts that drilling will seldom be restrained. On the other hand the courts will go very far in encouraging development even, in extreme cases, appointing a receiver for such purpose and awarding some other remedy to protect the litigants after oil is found.<sup>10</sup> The doctrine recognized by the court would place a heavy burden upon anyone asserting an adverse claim, for such claim, even without actual entry upon the premises, would necessarily cast a cloud upon the title of the other claimant, and prevent either claimant from effecting a sale of the premises. In such

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<sup>3</sup>*Barnsdall v. Bradford Gas Co.*, 225 Pa. 338, 74 Atl. 207, 26 L. R. A. N. S. 614 (1909).

<sup>4</sup>*Kelly v. Keys*, 213 Pa. 295, 62 Atl. 911, 110 Am. St. Rep. 547 (1906).

<sup>5</sup>*Stephens County v. Mid-Kansas Oil & Gas Co.*, 113 Texas 160, 254 S. W. 290 (1923).

<sup>6</sup>*SUTHERLAND, DAMAGES* (4th ed.), Sec. 994; Art. 7756, *TEX. REV. CIV. STAT.*, 1911.

<sup>7</sup>*Crawford v. Eidman*, 129 Fed. 992 (U. S. C. C. N. Y., 1902).

<sup>8</sup>*Bodkin v. Arnold*, 48 W. Va. 108, 35 S. E. 980 (1900).

<sup>9</sup>*THORNTON, OIL & GAS* (4th Ed.), p. 1641.

<sup>10</sup>*United North & South Oil Company v. Meredith*, 258 S. W. 550 (*Tex. Civ. App.*, 1923); same case, 272 S. W. 124 (*Tex. Comm App.*, 1925).

a case in the event of adjacent operations, a claimant's only remedy against drainage is to enter and drill offsets, taking the risk of an unfavorable decision as to his claim. If he should so seek to protect himself and the market should decline by virtue of his disproving the land, a successful opponent would have a cause of action for the loss in market value. If this were the law, it could logically follow that even in absence of drilling should the market value decline by virtue of adjacent operations disproving the territory or by draining the oil from under the premises before the conflicting claims were settled, the claimant finally prevailing would have a cause of action against the other for the loss. A conflicting claim would no longer be a disadvantage to the successful claimant, but in case the adverse claimant were solvent would be an insurance against loss. The law has never protected such interest in any such way. On the other hand it has always encouraged claimants to urge their claims by all peaceable means. The same rule applies here as in slander of title. So long as the claimant asserts a claim in good faith there is no liability incurred for a loss of a profitable sale on the part of the opposing claimant.<sup>11</sup> To allow such a recovery would place too big a burden upon the assertion of an adverse claim made in good faith. The possibility of loss pending the determination of conflicting claims is simply one of the risks incident to the privilege everyone has to use all peaceful means of self-help to support his claims and to an orderly system of doing justice.<sup>12</sup> The same policy denies recovery for such damages in actions for malicious prosecution and abuse of process except in cases involving both bad motive and want of probable cause.<sup>13</sup>

A simple action in tort for the trespass committed by the oil company would allow no such recovery. This theory would only permit recovery for the wrongful intrusion, damage done the physical property<sup>14</sup> and for any damages by way of aggravation. The injury done plaintiff's property beyond the wrongful intrusion was very slight, and the loss of a chance to bargain by the disclosure of the absence of oil would certainly not fall within the category of damages caused by way of aggravation.<sup>15</sup> If the trespass had been wilful and oil had been produced the oil company would have been liable for the value of the oil so produced.<sup>16</sup> On the other hand if the trespass were innocent and in good faith the reasonable costs of production would have been allowed as a set-off against the value of the oil

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<sup>11</sup>NEWELL, SLANDER AND LIBEL (4th Ed.), Secs. 162, 164, 168.

<sup>12</sup>Ward v. Mid-West & Gulf Co., 97 Okla. 252, 223 Pac. 170 (1923).

<sup>13</sup>POLLOCK, TORTS (12th Ed.), pp. 317, 318; Malone v. Belcher, 216 Mass. 209, 103 N. E. 637, ANN. CAS., 1915 A. 830 (1913).

<sup>14</sup>38 CYC. 1004.

<sup>15</sup>SUTHERLAND, DAMAGES (4th Ed.), Sec. 1010.

<sup>16</sup>Pittsburgh & West Virginia Gas Co. v. Pentress Gas Co., 84 W. Va. 449, 100 S. E. 296, 7 A. L. R. 901 (1919); see Madden: "Interference With Oil & Gas Rights," 28 W. VA. L. QUAR. 133; Mason v. United States, 273 Fed. 135 (1921).

taken.<sup>17</sup> If oil had simply been discovered but not taken a wilful trespasser would be allowed nothing for his expenses in making the discovery while if innocent he should be allowed to set off his reasonable expenses in making the discovery. Subject to qualifications not here pertinent<sup>18</sup> these are well recognized rules of damages. Clearly if the market value of the lease should be recognized as the basis of assessing damages, these rules would have to give way in all cases where the market value exceeded the value of the lease based on the oil produced or discovered. But in the case before the court, plaintiff sought no recovery under these rules because there was neither oil found or taken, nor were any damages alleged to have been done the land. Plaintiff's opportunity to bargain was rendered worthless by a disclosure of facts regarding his land, but his land itself was not damaged, except perhaps nominally. The law has never protected such an interest under the theory of trespass.

The case could not be maintained as an action for slander of title. Assuming that going upon the land wrongfully and disclosing its barrenness of oil would constitute a slander, although most courts require that the slander be in words<sup>19</sup> and that the damages be pleaded specially,<sup>20</sup> still at least two requisites of this action are missing. The information discovered and disclosed was not *false*, but on the other hand, was true; and the assertion of title was bona fide and *not malicious* or without reasonable basis.<sup>21</sup> "So it is not actionable for any man to assert his own right at any time. And even where the defendant fails to prove such right on investigation, still if at the time he spoke he supposed in good faith such right to exist, no action lies."<sup>22</sup> Under no analogy to this action could the present suit have been maintained.<sup>23</sup>

Before discussing the fourth theory that might be urged, notice is directed to the reasoning employed by the court. Its major or law premise is that "the exclusive right to enter upon the land, drill wells thereon, and remove therefrom the oil to exhaustion . . . is a property right which the law protects." Its minor or fact premise, however, is not coterminous with the major premise; the facts do not fit the proposition set forth. There was no *removal* of the oil, for there was none to remove. Assuming the major premise to be correct, the conclusion does not follow inasmuch as the minor premise

<sup>17</sup>Right of Way Oil Co. v. Gladys City Oil, Etc., Co., 106 Tex. 94, 157 S. W. 737, 51 L. R. A. N. S. 268 (1913); Guffey v. Smith, 237 U. S. 101, 59 L. Ed. 856, 35 Sup. Ct. 526 (1915).

<sup>18</sup>SUTHERLAND, DAMAGES (4th Ed.), Sec. 1019.

<sup>19</sup>Rhoades v. Bugg, 148 Mo. App., 707, 129 S. W. 38 (1910); NEWELL: SLANDER & LIBEL (4th Ed.), Sec. 161.

<sup>20</sup>Id. Sec. 160.

<sup>21</sup>Ward v. Mid-West & Gulf Co., note 11, *supra*; POLLOCK ON TORTS (12th Ed.), p. 309; NEWELL: SLANDER & LIBEL (4th Ed.), Secs. 162, 164.

<sup>22</sup>NEWELL: SLANDER & LIBEL (4th Ed.), Sec. 164.

<sup>23</sup>See Jeremiah Smith: Disparagement of Property, 13 COL. L. REV. 13, 122.



is faulty. And while it is clear that plaintiff had the exclusive right to enter upon his land and to drill wells thereon, it does not follow that a violation of this right is to be vindicated by the measure of damages employed by the court.

Plaintiff really sought relief because his interest in a good bargain was prejudiced by the information disclosed by defendant's drilling operations. Until the time that the drill penetrated the producing level defendant's trespass and adverse claim had merely interfered with plaintiff's privilege of selling. The value of the lease had been in no way impaired, except that plaintiff's title was clouded. But when the drill disclosed the non-productiveness of the ordinarily productive stratum the value of the lease was destroyed, not by reason of any damage done the exclusive right of plaintiff to drill, but by reason of the information that there was nothing to drill for. The exclusive right to drill had been invaded but not destroyed. If defendant's invasion of plaintiff's exclusive right to enter and drill could be considered as a conversion of a chattel, its value could be recovered, but it is a real property right and no such rule is recognized for the invasion of such a right.<sup>24</sup>

Has an owner a right to contract with respect to his property without having its value disclosed as a result of a wrongful act? It is this type of problem that calls upon a court either to recognize and protect some new interest of individuals in society or to reject them. Shall the law protect a property owner's interest in having the value of his property remain unknown in order that he may receive the benefits of bargaining with respect to it? If not so broadly recognized, shall such interest be protected even as against disclosures resulting from the invasion of some well established right? If such interest be given protection, what limitations shall be placed upon it? Should the protection be extended to the following situations?

(1) P's land is adjacent to a proven oil area. He refuses to allow it to be worked by geologists. Its value is \$500.00 per acre without a geological report. D goes upon P's land surreptitiously and observes surface indications which he reports to other geologists, with the result that no buyer will offer more than \$100.00 per acre for the lease. Is D liable for the decrease in value?

(2) D against the consent of P and over his protest takes his seismograph upon D's land and by means of an explosion thereon causes such machine to register the presence or non-presence of salt domes, which if present are indicative of oil. The disclosures by reason of this trespass reduce the market value as in the first case.

Both of these cases were wilful trespasses for the purpose of determining the probability of the presence of oil. Suppose the trespasses were innocent, that is, the trespassers believed they either had P's consent or else were upon the land of X?

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<sup>24</sup>Willis & Bros. v. Morris, 66 Texas 628, 1 S. W. 799, 59 Am. Rep. 634 (1886).



(3) Suppose that P was about to sell X a certain horse that everyone believed to be an excellent race horse. D broke into P's stable and observed certain facts about the horse which he disclosed to X, whereupon X would not buy at any price, and the market value of the horse was greatly decreased.

(4) Suppose P was a pugilist of local fame who was about to enter a good contract with Dempsey. X and Y thought they would obtain some reliable data on P's strength, courage, tactics, etc., and got A, another pugilist, to assault P so as to test out his fighting ability. A succeeds in thrashing P and thereupon P's fame dies and he loses the opportunity to make his valuable contract.

(5) P is a painter of some renown and is about to make some valuable contracts with X, Y, and Z, for painting their pictures. D steals into P's files and obtains certain data which he discloses to X, Y, and Z, and which causes P to lose such contracts as well as his high reputation as a painter.

(6) P has a diamond field. He has been offered good prices on the basis of specimens submitted. He refuses to allow others to examine his land. D steals in and finds certain specimens which being disclosed, causes the offers to be withdrawn.

In all of these cases nothing other than facts have been disclosed. All such facts have been obtained by wrongful acts, that is, acts which invaded well recognized rights of P. P himself was acting in the best of good faith. Has he a cause of action for the loss of his bargains or the market value of his property as the case may be?

Moreover, suppose P knew that the market values of his properties or capacities were greatly in excess of their real values, but he was guilty of no fraud or concealment of any kind. Would this factor affect the measure of damages?

No perfect analogy has been found. The law has been very sparing in the protection afforded interests pertaining to the personality other than those of bodily security. No liability is incurred for disclosing facts which destroy the enjoyment of a high and valuable reputation. The truth, at common law, is always a defense.<sup>25</sup> The desire to have one's affairs remain unknown and unpublished has received very limited recognition under the right of privacy. The cases recognizing this new right have been confined largely to unpermitted uses of a person's name or likeness and perhaps could all be brought under some already well established right.<sup>26</sup>

Suppose D should intrude upon P's premises and by peeping and eavesdropping discover that P, a highly regarded and sincere minister, was guilty of such conduct in his home as would not appeal to the popular imagination as worthy of a minister. Would a disclosure of such facts entitle P to maintain a suit against D for his damaged reputation? Could P hang onto his suit for trespass, damages for his lowered standing in the community? If not, shall the reputation

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<sup>25</sup>NEWELL, *LIBEL AND SLANDER* (4th Ed.), Sec. 696.

<sup>26</sup>See 10 MINN. L. REV. 55.

of P's property be given a protection that is denied his personality? So far as can be found no right to be free from interference in making purely personal contracts has been recognized in absence of fraudulent, coercive or like interference. No right has been found to make contracts with reference to property without interference on the part of third persons so long as the disclosures made by such third persons were facts. For instance, if P were about to sell a lease on his property to X, and D should, for the very purpose of spoiling the sale, disclose to X facts about the property which rendered a lease undesirable, there would be no liability on D's part. Whether done innocently or "maliciously," the law has never given protection to one's interest in a good bargain as against his neighbors who confine their disclosures to facts. If such were recognized it would quickly become the most valued of rights.

Would it be well to recognize such a right as against disclosures made by persons who obtained information concerning plaintiff's property by wrongful conduct, such as trespass, deceit, or bribery? Suppose P had worked out what he thought to be a valuable process for which he was offered a good price, and D should, by bribing the servant of P, find out the facts and upon making the same known it became clear that the process had no real value and the offer was withdrawn. Could P maintain suit against D for damages on account of the loss of the sale? A formula or trade secret is a property right.<sup>27</sup> D wrongfully caused the servant to violate his duty to P. P lost a sale. Assume the most extreme case. Suppose P should apply for insurance and having answered all questions truthfully and having successfully passed a physical examination the company would in due course have issued a policy. But D, an examiner for a rival company, by abusing his relationship as P's family physician, induced P to submit to a physical examination which disclosed a fatal disease, such as cancer. D made known this information to the insurance company for the purpose of preventing P from getting insurance. Has P a cause of action against D for the loss of this valuable contract?

Possibly an analogy might be drawn from the cases allowing recovery for being denied a chance to compete for a prize<sup>28</sup> or to submit plans for a building<sup>29</sup> or to win an award.<sup>30</sup> But it is not believed that those cases are analogous. In them there is actually some value in the chance or opportunity, for the holder of the lucky number, or the person given the award will actually obtain a value, while in the case of a property right which has no actual value, but only a speculative or market value, nothing in fact is lost except the oppor-

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<sup>27</sup>8 CORNELL L. QUAR. 174.

<sup>28</sup>Kansas City M. & O. Ry. Co. v. Bell, 197 S. W. 322 (Tex. Civ. App., 1917).

<sup>29</sup>Adams Express Company v. Egbert, 36 Pa. 360, 78 Am. Dec. 382 (1860).

<sup>30</sup>Chaplin v. Hicks, 2 K. B. 786 (1911); see McCormick: "Highest Intermediate Value," 3 TEXAS LAW REVIEW, 48-49.

tunity to make a good bargain. A case more analogous would be one in which a contestant was prevented by wrongful conduct of defendant from realizing on his chance for a prize of supposedly great value, but which in fact was without value, or a case in which there was in fact no prize at all.

By thus projecting the case far beyond its facts and assuming that the oil company knew that it had no claim to the land, but went upon it for the purpose of taking any oil that might be found, and further knew that the market value would be destroyed if none were found, still it is believed that there would be no liability for the loss in market value so long as the disclosures made by its drilling or reports consisted of facts. The reasons are not hard to discover, but any generalization may be inaccurate. While the policy of the law protects and encourages almost every kind of business interest or venture, and all business is more or less speculative and hazardous, still there are limits beyond which the law will not extend its protection. When a plaintiff can show with reasonable certainty that his speculation would have been profitable and that defendant has interfered with it by some species of misrepresentation or fraud, the law generally will penalize such conduct by giving damages. But whenever the speculation has no value basis in fact, such disclosure, however malicious, imposes no liability. And this is true although such speculation is wholly legitimate and those who do not know the facts, are willing to take the risk. The law will not countenance fraud, but neither will it penalize the discoverer or the publisher of the truth. Hence in the business world one risk which every speculator runs, is that of having his speculation spoiled by a disclosure of facts which will render it valueless. If the facts have been discovered by the violation of some right, such right will be vindicated but not to the extent of penalizing the publication of the truth however disastrous its effect.

Perhaps this further should be said. The analogies suggested may be misleading and prove too much. It is not necessary nor desirable that the law be logical and to so conceive it is illusory. Whether it would serve the interests of society, set up a good policy, to give this interest of property owner the protection extended in this case may be after all the whole question. The question balances about this way as suggested by the trial court:<sup>31</sup> If defendant as a wilful trespasser found oil, plaintiff would have secured development and would also have taken all the oil. He would have had a double gamble without risk. Necessarily, if the case is correctly decided, plaintiff could have prevented drilling by injunction. But he chose to take no chance at all plus a greater advantage than he would have had in absence of defendant's trespass. His cue was to sit tight. On the other hand, defendant never had a chance at all. Whether he found oil or not, he could not receive any benefit; he was certain to lose at least his expenditures for development. In addition to

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<sup>31</sup>261 S. W. 231.



rendering this service of development to plaintiff, does justice demand that defendant be further penalized by having to pay the market value of the lease which his drilling has shown to be in fact worthless? If so, the plaintiff is on the one hand enriched for something he in fact did not have, and at the same time has had all the chances that development might furnish, while the defendant is out his expenditures and is paying for something which he never had a chance to get.

If defendant be considered as an innocent trespasser the result is even more shocking. The plaintiff has all the advantages of the other situation, while defendant in addition to his other penalties could in no case attempt protection of himself through development, however bona fide his claim. Until this decision no policy or justice was ever supposed to demand such penalties of a defendant or extend such protection to a plaintiff.

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Another phase of the case is that the oil company had the permission of Lang, one of the co-owners of the mineral interest in the land, to enter and drill. Under this permission the oil company had the right, without Kishi's consent, to develop the premises and take the oil therefrom, subject only to the duty of accounting to Kishi for his part of the production.<sup>32</sup>

It cannot be said, therefore, that the oil company was a trespasser, unless its adverse claim to Kishi's three-fourths interest made it so. It is an anomalous doctrine that would hold the oil company both in rightful possession of the land and the same time a trespasser subject to be dispossessed. Nor is such the law. One cotenant cannot oust another cotenant from possession; both are entitled to possession. Kishi's remedy was to vindicate his title against defendant's claim together with recovery of possession, subject to possession also on the part of the oil company,<sup>33</sup> and to wait until oil was produced and then to demand an accounting or perhaps a receiver. Under no theory was Kishi entitled to damages for the decline in market value of the leasehold estate.

*Leon Green.*

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**BANKRUPTCY—RIGHT OF TRUSTEE TO PROPERTY SOLD TO BANKRUPT UNDER AN UNRECORDED CONDITIONAL SALE.**—The recent case of *In re Master Knitting Co.*<sup>1</sup> brings up a question that is always of interest to lawyers having a bankruptcy practice, namely, the rights of a trustee to property sold to the bankrupt under an unrecorded

<sup>32</sup>*Burnham v. Hardy Oil Company*, 147 S. W. 330 (Tex. Civ. App., 1912); *New Domain Oil and Gas Company v. McKinney*, 188 Ky. 183, 221 S. W. 245 (1920); *Compton v. People's Gas Co.*, 75 Kan. 572, 89 Pac. 1039, 10 L. R. A. (N. S.), 787 (1907).

<sup>33</sup>*Bennett v. Virginia Ranch Land & Cattle Company*, 1 Tex. Civ. App. 321, 21 S. W. 126 (1892).

<sup>1</sup>7 Fed. (2d) 11 (1925).



conditional sale. In that case B had sold and delivered machinery to M, retaining title in himself until the machinery should be paid for. He failed to record the conditional sale agreement as required by the New York statutes. M later became bankrupt and B filed a petition in the bankruptcy court for reclamation of the machinery, alleging that M had defaulted in his payments. The court held that, since unrecorded conditional sales are void as to attaching creditors, without notice, and since the trustee had the position of an attaching creditor under Section 47a of the Bankruptcy Act, B should not get the machinery until it was shown that all the creditors of M had notice of the conditional sale. And, since the machinery was in the possession of the court, B was in the position of plaintiff and must bear the burden of proof.

The 1910 amendment to Section 47a of the Bankruptcy Act provides that the trustee, as to all property in the possession of the bankruptcy court shall have all the rights, remedies, and powers of a creditor holding a lien by equitable or legal proceedings. Two lines of decisions, under this amendment, have arisen in the inferior federal courts defining the rights of a conditional vendor, whose sale is unrecorded, as to property which is in the possession of the bankrupt at the time the bankruptcy proceedings were begun. The precise question has never reached the Supreme Court. The first line of decisions holds that the effect of the amendment is to give the trustee, in his official capacity, the position of an attaching creditor for the benefit of the general estate.<sup>2</sup> The other view, typified by the above case, is that the trustee takes the position of an attaching creditor as agent for the individual creditors. The question of the interpretation of this amendment arises in two different situations: first, reclamation proceedings for the possession of the goods by the conditional vendor;<sup>3</sup> second, cases arising over the distribution of the proceeds of the goods, the conditional vendor not having been allowed to recover them in the reclamation proceedings.<sup>4</sup>

In reclamation proceedings, under the first view of the amendment, mentioned above, the conditional vendor, to recover the goods, would have to show that the trustee, in his official capacity, had notice of his interest in the property. To do this he would have to show that the trustee was charged with notice of such interest as of the date of the filing of the petition, for the trustee's attachment is held to date from such time. This situation has arisen in but two cases: one, in a voluntary petition in bankruptcy, where an inventory of the bankrupt's property, with the claims against such, is filed with the petition (this is never true of an involuntary bankruptcy);<sup>5</sup> the other, when a suit is pending in regard to the prop-

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<sup>2</sup>In *re Farmers' Co-op. Co.*, 202 Fed. 1008 (1913).

<sup>3</sup>In *re Bazemore*, 189 Fed. 236 (1911).

<sup>4</sup>In *re Fidler & Brock*, 136 C. C. A. 589, 220 Fed. 843 (1915).

<sup>5</sup>*American Laundry Mach. Co. v. Everybody's Laundry*, 185 Iowa 760, 171 N. W. 161 (1919); In *re Doughnut Co.*, 6 Fed. (2d) 1015 (1925).

erty at the time of the filing of the petition.<sup>6</sup> Under the second view, to recover the goods, the conditional vendor must show that each of the creditors of the bankrupt had notice of his claim to the property at the date of the filing of the bankruptcy petition, which is the time of the attachment.<sup>7</sup> Nearly all the cases that discuss the object of the amendment say it was passed for the benefit of the creditors, they being prevented from pursuing their own claims against such property after the bankruptcy proceedings are instituted.<sup>8</sup> It would thus seem that this second interpretation comes closer to fulfilling the object of the amendment because under it the rights of the creditors are not cut off by notice to a third party, the trustee.<sup>9</sup> This view would also eliminate the discrimination, discussed above, between voluntary and involuntary bankruptcies, that arises under the first view.

The second situation in which the question of interpretation of this amendment arises is in the distribution of the proceeds of the property, the conditional vendor not having shown a right to reclaim them.<sup>10</sup> Distribution of the proceeds from the goods presents two problems: first, the division of such proceeds between the trustee, as representative of the general creditors, and the conditional vendor, as a preferred creditor; second, the further division of that part of the proceeds retained by the trustee among the general creditors. What is the effect of the amendment on the first of these two problems? Under the first view of the amendment, since the trustee himself, in his official capacity, is regarded as the attaching creditor for the benefit of the general estate, the entire property would be divided among all the creditors, the conditional vendor taking his position along with the other creditors.<sup>11</sup> The effect of such a view is to overrule completely the state rules of priority. Thus creditors who, because of notice of the lienholder's claim could not contest his lien and resulting priority if the bankruptcy had not intervened, are allowed to stand on an equal footing and share equally in the division with the lienholder. The second view of the amendment eliminates this objection because there the different creditors are regarded as remaining in the same relative positions they had at the beginning of the proceedings, the only change being that they are severally regarded as having attached the goods by the effect of the amendment. Thus when the conditional vendor proves that some of them had

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<sup>6</sup>*Bank v. Waggener*, 94 Ore. 318, 186 Pac. 41 (1919).

<sup>7</sup>*In re Bazemore*, 189 Fed. 236 (1911).

<sup>8</sup>*Cooper Groc. Co. v. Park*, 134 C. C. A. 64, 218 Fed. 42 (1914); *In re Sternberg*, 300 Fed. 881 (1924).

<sup>9</sup>*Cooper Groc. Co. v. Park*, note 8, *supra*.

<sup>10</sup>In passing from reclamation of the goods to the distribution of the proceeds from them, it might be noted that the question of reclamation could only arise in case of an unrecorded conditional sale, the vendor having title and claiming the goods themselves, but the question of distribution arises in all cases where a creditor has an unrecorded lien on goods in the possession of the bankrupt.

<sup>11</sup>*In re Farmers' Co-op Co.*, 202 Fed. 1008 (1913).

notice of his claim as of date anteceding the beginning of the proceedings, his lien is validated as far as the claims of such creditors are concerned, and so his debt has priority over theirs in sharing the proceeds of the goods. As a result, only the total amount of the claims of those creditors who could have secured priority over the conditional vendor's lien by an actual attachment at the time of the bankruptcy proceedings is allowed to stand ahead of the conditional vendor's claim on the goods.<sup>12</sup>

Then as to the second problem of distribution, namely, the division of the proceeds the trustee retains, as against the lienholder's claim, among the general creditors. If this division were made under the state laws of priority, as if the bankruptcy had not intervened, only those creditors whose attachments were held superior to the conditional vendor's claim would share in the amount to be taken from the property. However, the bankruptcy has intervened, and the distribution must be governed by principles of bankruptcy law. Section 67f provides that any lien obtained by a creditor within four months of the institution of the bankruptcy proceedings will be either declared void or preserved for the benefit of the estate. This section of the act is held to apply only to liens acquired *before* the institution of the proceedings; and so would not apply where the creditors are given the position of attaching creditors *as of the date* of the filing of the bankruptcy petition. It is not likely, however, that Congress intended that these liens, given to the creditors by the act and not by their own diligence, should not be administered for the benefit of the estate, when, if the same creditors had actually secured attachments on the goods before the beginning of the proceedings, such liens would be taken from them for the benefit of all the creditors, under Section 67f. So, by analogy to Section 67f, these gift liens resulting from Section 47a should be administered for the benefit of the estate.

*Richard L. Hughston.*

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INTERNATIONAL LAW—THE EFFECT UPON PRIVATE PROPERTY RIGHTS OF THE ACTS AND DECREES OF REVOLUTIONARY GOVERNMENTS AND REVOLUTIONARY FACTIONS.—In the case of *Cia. Minera Ramos v. Bartlesville Zinc Co.*,<sup>1</sup> recently decided by the Supreme Court of Texas, the plaintiff sued for damages for the conversion of ore which had been seized and confiscated by an officer of Villa during his contest with Carranza for the control of Mexico. The ore was purchased of the Villa officer and shipped into Texas, where it was held by the defendant. The defendant contested the plaintiff's suit on the grounds (1) that the Villa faction, at the time of the confiscation, represented the *de facto* government of northern Mexico, and (2) that the ore was seized by an officer of a belligerent force engaged in actual war. The court held that the Villa faction

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<sup>12</sup>In re Fidler & Brock, 136 C. C. A. 589, 220 Fed. 843 (1915).

<sup>1</sup>275 S. W. 388 (1925).



did not constitute a government, the acts or decrees of which a court would recognize, and that the validity of the decrees of a revolutionary faction depended solely upon its ultimate success at arms.

When the political department of the government of which the court is an instrumentality has extended recognition to the revolutionary government, the acts or decrees of which are in question, the court considers itself bound to regard them as valid acts or decrees of a sovereign government,<sup>2</sup> and no evidence will be heard in proof of the incompetency of an existing government which has been so recognized.<sup>3</sup> The recognition is regarded as being retroactive and as validating all of the acts of the revolutionary faction from its inception.<sup>4</sup>

In the absence of recognition by the political department the courts are forced to the choice of either regarding the failure of the political department to extend recognition as binding them to disregard the acts and decrees of the revolutionary faction and thus treat them as having no effect upon property rights *or* to consider the governmental competency of the faction as a question of fact and be governed by their conclusions from evidence in adjudicating the rights of the parties. Most of the courts have adopted the first alternative and refuse to give effect to a government's acts or decrees or even to acknowledge its existence until it has been recognized by the political department.<sup>5</sup> This rule has resulted in manifest injustice in several cases, and the writers have endorsed the other alternative,<sup>6</sup> which was recently acted upon by the Court of Civil Appeals of New York in the case of *Russian Reinsurance Co. v. Stoddard*.<sup>7</sup> It is clear that the determination of the question of competent government *vel non* in passing upon the force to be given a decree for the sole purpose of adjudicating private rights does not involve meddling with a political question.<sup>8</sup> From the opinion in the principal case it is evident that had the Villa faction been ultimately successful at arms its acts would be regarded as effective, independent of recognition from the political department.

If, in the absence of affirmative action of the political department, the courts are to consider the competency of a new government arising out of revolution as a question of fact, what should be the test of this competency? The principal case sets out two types of revo-

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<sup>2</sup>*Terrazas v. Holmes*, 275 S. W. 392 (1925), and *Terrazas v. Donohue*, 275 S. W. 396 (1925), which were decided by the court concurrently with the principal case.

<sup>3</sup>*State of Yucatan v. Argumedo*, 92 Misc. 547, 157 N. Y. S. 219 (1915).

<sup>4</sup>*Underhill v. Hernandez*, 168 U. S. 250, 42 L. Ed. 265, 18 Sup. Ct. 83 (1897).

<sup>5</sup>*Wulfsohn v. Russian Sov. Rep.*, 234 N. Y. 372, 138 N. E. 24 (1923), *Luther v. Sagor & Co.* [1921], 1 K. B. 456, reversed on new facts in [1921] 3 K. B. 532.

<sup>6</sup>19 AM. JOUR. INT. LAW, 263 and 753.

<sup>7</sup>240 N. Y. 149, 147 N. E. 703 (1925).

<sup>8</sup>22 MICH. L. REV. 29, 118; 31 YALE L. JOUR. 534.



lutionary governments<sup>9</sup> arising out of success at arms of a revolutionary faction: (1) the agency which has expelled the prior regularly constituted authorities from the seat of government and has assumed their power over the whole domain, and (2) the agency which has expelled the regularly constituted authorities from a particular part of the domain and has been ultimately successful in gaining recognition of its sovereignty from the government against which the revolt was directed.<sup>10</sup>

In the first type, an example of which is the present Russian government, "ultimate success at arms" means completely supplanting the old government. This type of government arising out of revolutionary action might present some difficulties to a court. The old government may be completely overthrown yet the new government be insecure in its sovereignty. In *Russian Reinsurance Co. v. Stoddard*,<sup>11</sup> the court took into consideration, among other things, the following facts:

The state of Russia is now governed by the Russian Socialist Federated Soviet Republic. Such government there exists clothed with power to enforce its authority within its own territory, obeyed by the people whom it rules, capable of performing the duties and fulfilling the obligations of an independent power, and able to enforce its claims by military force.<sup>12</sup>

The following countries have extended full recognition to the Russian Socialist Federated Soviet Republic: (fifteen countries were named).

These facts, in connection with evidence of internal peace, should be very persuasive if not conclusive of the competency of the government and hence the validity of its acts and decrees as they affect private rights.

In the second type, an example of which is the colonial Confederation, "ultimate success at arms" means the securing of recognition of its independence through treaty of peace with the mother country. Where this complete success had been attained the court would have no trouble in determining it, for a copy of the treaty could be introduced in evidence. Recognition through treaty by the mother country should convince the court of the competency of the new government, for by it the sole obstacle to the revolutionists' objective would be removed. Where the revolutionists in a detached part of the mother country have been successful in expelling the regularly constituted authorities and in defending their autonomy for some time and the mother country fails to recognize them in any way, as in

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<sup>9</sup>Quoted in the principal case from *Williams v. Bruffey*, 96 U. S. 185, 186, 24 L. Ed. 716 (1877).

<sup>10</sup>HALLECK ON INTERNATIONAL LAW AND LAWS OF WAR, 75, Sec. 22; Thomas v. Taylor, 42 Miss. 651, 707, 2 Am. Rep. 625 (1869).

<sup>11</sup>*Supra*, n. 7.

<sup>12</sup>For other matters to be considered see *Yrsarri v. Clement*, 11 Moo. C. P. 308 (1826); Borchard, THE DIPLOMATIC PROTECTION OF CITIZENS ABROAD (1915), 210 and 235 et seq.

the case of the South American states after their revolt against Spain, the courts should, probably, treat the matter of competency as dependent upon much the same considerations as in the first enumerated case discussed above.

The two situations just discussed dispose of the possibilities where the revolting faction is successful, but what of the cases in which success at arms has not been achieved? Two possibilities of importance will be examined: (1) where the revolutionary faction has maintained, for a time, its control over a particular part of the domain by force of arms and in constant military opposition to the regularly established government and has been brought under subjection by the mother country at the time of the court's consideration, and (2) where at the time of the court's consideration, an armed conflict between the regularly constituted government and the revolutionary faction is in progress, or, the old government being deposed or having abdicated, a conflict between two revolutionary factions is in progress, each faction occupying a more or less definite portion of the domain.

The southern Confederacy was of the first type, and most of the decisions dealing with the situation arose out of acts of the Confederate government. The Supreme Court of the United States has consistently regarded all acts of that government as having no legal effect<sup>13</sup> except as they affected the enforcement of private contracts.<sup>14</sup> However, the acts of the state governments of the South were given effect unless they were in aid of the rebellion.<sup>15</sup> As was said in *Thorington v. Smith*,<sup>16</sup> "From a very early period of the Civil War to its close, it [the Confederate government] was regarded as simply the military representative of the insurrection against the authority of the United States." It was accorded neither the rights of a government or the full rights incident to war by the federal courts. The courts of England, standing in a more neutral position to the matter, called the Confederacy a *de facto* government and protected its citizens who had dealt with that government.<sup>17</sup> In the case of *United States v. McRae*<sup>18</sup> it was held by an English court that the United States was entitled to private property taken by the Confederacy, and then in the hands of a Confederate agent, as the successor to that government, thus recognizing the force of its decrees to divest title to the property. In the case of *King of the Two Sicilies v. Willcox*<sup>19</sup> a like result was reached in regard to a confiscation of property by a revolutionary force in Sicily. These decisions of the

<sup>13</sup>*Williams v. Bruffey*, 96 U. S. 185, 24 L. Ed. 716 (1877); *Sprott v. United States*, 20 Wall. 459, 22 L. Ed. 371 (1874); *Dewing v. Perdicaries*, 96 U. S. 193, 195, 24 L. Ed. 654 (1877).

<sup>14</sup>*Thorington v. Smith*, 8 Wall. 1, 19 L. Ed. 361 (1868).

<sup>15</sup>*Sprott v. United States*, note 12 *supra*.

<sup>16</sup>*Supra*, n. 14.

<sup>17</sup>*United States v. Priolean*, 35 L. J. Ch. Rep. N. S. 7 (1865).

<sup>18</sup>L. R. Eq. 69 (1869).

<sup>19</sup>1 Sim. N. S. 301, 19 L. J. Ch. 488, 14 Jur. 751 (1851).

English courts were founded, in part, upon the rights incident to war accruing by virtue of the recognition of belligerency. The Texas court in the *Cia. Minera Case* held that the Villa government was of the same class as the Confederacy, and said that none of the incidents of belligerency attached to contenders in civil war, such rights being applicable only to war between sovereign states.<sup>20</sup> The court relied upon the decisions of the Federal Supreme Court in cases arising out of the Civil War. It is to be noted that the Villa faction never in fact occupied a governmental status in Mexico equal to that attained by the Confederacy in this country. There was a government in the South which exercised supreme power over a vast domain for nearly four years.<sup>21</sup> It is to be doubted whether ultimate success at arms should be held the one thing sufficient to constitute a revolutionary faction a competent government in the sense that its acts and decrees should be held effective by the courts. An agency having all of the indicia and power of a government, even though ultimately unsuccessful in maintaining itself in power, might be recognized as competent by all courts as the Confederate government was by the courts of England.

If the rule announced in the *Cia. Minera Case* restricting the powers incident to war to conflicts between sovereign states should be adopted by the courts, the acts and decrees of revolutionary factions contending at arms at the time of the court's consideration would be universally held of no effect. But all of the authorities do not agree to this proposition.<sup>22</sup> In the case of *O'Neill v. Central Leather Co.*<sup>23</sup> the New Jersey court held that the recognition of belligerency by President Wilson in his message to Congress justified the court in regarding the Villa faction as active belligerents having all of the rights incident to war. The decree of confiscation by one of Villa's generals was upheld and given effect. The court regarded the Huerta government as virtually non-existent and that there was no government in the country except the military powers of Villa and Carranza.

Unless the validity of the acts and decrees of revolutionary factions are regarded as thus resulting from the recognition of belligerency, no effect should be given them in the second situation enumerated above, for they are not governments in any true sense of the word. They are not the agents of the sovereign state, but are irresponsible factions, the status of which is undetermined by either victory or defeat. In such cases the courts might make secure both parties whose property rights are dependent upon the validity or

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<sup>20</sup>Accord, *Smith v. Stewart*, 21 La. Ann. 67, 70 (1869).

<sup>21</sup>Field, J., dissenting, in *Sprott v. United States*, note 12.

<sup>22</sup>VATTEL, *LAW OF NATIONS*, 425; *Henry v. Gardner*, 57 Tenn. 420 (1873); (semble) *Russek v. Angulo*, 236 S. W. 131 (Tex. Civ. App., 1922).

<sup>23</sup>87 N. J. L. 552, 94 Atl. 789, L. R. A. 1917A, 276 (1915), reversed on new facts, 246 U. S. 297 (1918). The Texas court noted and refused to follow the New Jersey holding.



invalidity of a revolutionary faction's decree and await the final decision at arms, thus reviving, in a way, the wager of battle.

W. L. Matthews.

**RIPARIAN RIGHTS—INJUNCTION WITHOUT DAMAGE FOR THE NON-RIPARIAN USE OF FLOWING WATERS.**—The general principle, embodying the rights of riparian owners, is stated thus: each riparian proprietor is entitled to have the water flow as it has been accustomed to flow<sup>1</sup> subject to the right of the other owners to use the water in certain defined ways<sup>2</sup> which may be termed "riparian" uses. To what extent can this right be asserted by an undamaged lower owner to prevent the non-riparian, but beneficial, use of the water by an upper proprietor? The Texas courts have not been called on to answer the question, but they have held that the use of water for irrigating non-riparian land will be enjoined when such use injures a lower owner<sup>3</sup> and that an upper proprietor can acquire a prescriptive right to the use of the water.<sup>4</sup> As our state develops, especially the arid portions, the water supply must be utilized to its greatest extent, and it is in this connection that the question will probably arise. The conclusions reached by some of the other courts should be of interest in considering the probable course which our own courts will follow.

I. Formerly the lower owner often sued for damages, but this remedy is now infrequently sought. Under the principle announced above a recovery of nominal damages, even when there was no actual injury, was allowed on the ground that the law will imply some damage to prevent the acquisition of a prescriptive right.<sup>5</sup> There is another line of decisions, however, which refuses recovery in these

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<sup>1</sup>TIFFANY, REAL PROPERTY, 1131; 40 Cyc., 562; note, 41 L. R. A. 737.

<sup>2</sup>Such as for domestic purposes, washing, drink for himself and his beasts, in which instance the upper owner may use all of the water. Rhodes v. Whitehead, 27 Tex. 304 (1863); Baker v. Brown, 55 Tex. 377 (1881). The water may be used for irrigation after the lower proprietors have sufficient to satisfy their domestic needs. Note, 41 L. R. A. 741, Fleming v. Davis, 37 Tex. 173 (1873). Other uses, such as furnishing water to a municipality or supplying locomotives with water are not deemed to be within the scope of riparian privilege. Saunders v. Bluefield Waterworks & I. Co., 58 Fed. 133 (1893); McCartney v. Londonderry & Lough Swilly R. R. Co. [1904], A. C. 301. The term "reasonable use" is generally used instead of "riparian use." No rule as to what is a reasonable use can be laid down which will apply to every case, 27 R. C. L. 1083; note, 41 L. R. A. 739. The reasonableness of other uses than the above mentioned riparian uses is determinable by the facts in each case. Elliott v. Fitchburg R. R. Co., 10 Cush. 191, 57 Am. Dec. 85 (Mass., 1852); Gehlen v. Knorr, 101 Ia. 700, 70 N. W. 757, 63 Am. St. Rep. 416, 36 L. R. A. 697 (1897); it is often a question for the jury, Pool v. Lewis, 41 Ga. 162, 5 Am. Rep. 526 (1870); Hazeltine v. Case, 46 Wis. 391, 32 Am. Rep. 715 (1879); Lawrie v. Silsby, 82 Vt. 505, 74 Atl. 94 (1909).

<sup>3</sup>Watkins Land Co. v. Clements, 98 Tex. 578, 86 S. W. 733 (1905).

<sup>4</sup>Martin v. Burr, 111 Tex. 57, 228 S. W. 543 (1921).

<sup>5</sup>Plumleigh v. Dawson, 1 Gil. 544, 41 Am. Dec. 199 (Ill., 1844); 27 R. C. L. 1116.



cases.<sup>6</sup> In *Stratton v. Mt. Hermon Boys' School*<sup>7</sup> the court said: "if he diverts the water to a point outside the watershed or upon a disconnected estate, the only question is whether there is actual injury to the lower estate for any present or future reasonable use. The diversion alone, without evidence of such damages, does not warrant a recovery even of nominal damages." The cases taking this view seem to be decided on the theory that the upper owner does not make an unreasonable use of the water until there has been actual damage to the lower proprietor, and consequently there has been no interference with the latter's rights.

II. Injunctive relief is a proper remedy in these cases and it is with it that we are chiefly concerned.<sup>8</sup> Three courses have been pursued in those cases in which an injunction has been sought: the injunction has been denied;<sup>9</sup> an absolute injunction has been granted;<sup>10</sup> and a modified injunction has been given.<sup>11</sup> The cases refusing an injunction represent a weak minority. *The Earl of Sandwich v. Great Northern Ry. Co.*<sup>12</sup> and *Modoc Land and Live Stock Co. v. Booth*,<sup>13</sup> relied upon to support the minority, have been overruled. In *McCartney v. Londonderry & Lough Swilly Ry. Co.*<sup>14</sup> the House of Lords, on practically the same state of facts as in the *Earl of Sandwich Case*, enjoined the railroad from supplying its locomotives with water pumped from a stream. The pumping caused no damage to the plaintiff other than an infraction of his technical right to have the water flow in the usual manner. It was held that the quantity diverted was immaterial, that the right of the lower proprietor to a full flowing stream should be preserved intact in order to prevent the upper owner from acquiring a prescriptive right. The

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<sup>6</sup>*Elliott v. Fitchburg R. R. Co.*, 10 Cush. 191, 57 Am. Dec. 85 (Mass., 1852); *Stratton v. Mt. Hermon Boys' School*, 216 Mass. 83, 103 N. E. 87, ANN. CAS. 1915A, 768, 49 L. R. A. (N. S.), 57 (1913); *Ry. v. Beauchamp*, 19 Ky. L. Rep. 398, 40 S. W. 679 (1879).

<sup>7</sup>Note 6, *supra*.

<sup>8</sup>POMEROY ON EQUITY, Sec. 1796; 40 Cyc. 566.

<sup>9</sup>*Earl of Sandwich v. Great Northern Ry. Co.*, 10 Ch. Div. 707 (1875); *Modoc Land and Livestock Co. v. Booth*, 102 Calif. 151, 36 Pac. 431 (1894); *Watson v. New Milford Water Co.*, 71 Conn. 442, 42 Atl. 265 (1899); *Harris v. Norfolk & Western Ry.*, 153 N. C. 542, 69 S. E. 623, 31 L. R. A. (N. S.), 543 (1910).

<sup>10</sup>*McCartney v. Londonderry & Lough Swilly Ry.* [1904], A. C. 301; *Anaheim Union Water Co. v. Fuller*, 150 Calif. 327, 88 Pac. 978, 11 L. R. A. (N. S.) 1062 (1907); *Griffith v. Monongahela R. R.*, 232 Pa. St. 639, 81 Atl. 713, ANN. CAS. 1912D 13 (1911); *Garwood v. N. Y. C. & H. R. R.*, 83 N. Y. 400, 38 Am. Rep. 452 (1880); *Amsterdam Knitting Co. v. Dean*, 162 N. Y. 278, 56 N. E. 757 (1900).

<sup>11</sup>*Ulbricht v. Eufaula Water Co.*, 86 Ala. 586, 6 So. 78, 11 Am. St. Rep. 72, 4 L. R. A. 572 (1889). Cited and approved in *Jones v. Conn.*, 39 Ore. 466, 65 Pac. 1086, 87 Am. St. Rep. 634, 54 L. R. A. 630 (1901).

<sup>12</sup>Note 9, *supra*.

<sup>13</sup>Note 9, *supra*. An historical discussion of the development of the law of waters in California is found in 10 CALIF. L. REV. 443.

<sup>14</sup>Note 10, *supra*.

conclusion is reached in *Anaheim Union Water Co. v. Fuller*,<sup>15</sup> which overrules the *Modoc Case*, that the lower owner is not required to show "any actual present damage. The diversion by lapse of time may grow into a right. To prevent such a result an injunction will be awarded." These two cases represent the weight of authority.

It seems clear, then, that our courts in deciding the question will be forced by authority to grant injunctive relief. While it is inequitable to allow the lower owner to lose his right by prescription, it is at the same time manifestly unjust to deprive the upper owner of his beneficial use of the water in which he is damaging no one. This problem<sup>16</sup> is solved in the Alabama case of *Ulbricht v. Eufaula Water Co.*<sup>17</sup> The upper riparian proprietor diverted the water for the purpose of supplying the inhabitants of a town. The lower owner sought to enjoin this diversion though he received sufficient water to satisfy his reasonable needs and suffered no perceptible injury from the diversion. The court allowed a modified injunction which vindicated the plaintiff's right but permitted the defendant to continue its use of the water so long as the plaintiff suffered no actual damage. The court says: "but inasmuch as he has taken no advantage of his usufructuary right but allows the water to flow by unutilized, and it appears to be of no especial value to him, he will not be permitted to call for equitable interference in his behalf further than to vindicate his right and prevent a loss of it by adverse user and lapse of time." This ruling seems to be practical, it recognizes the outstanding rights of both parties, and at the same time allows the waters of the stream to be used to their full capacity, yet it is evasive in that it apparently recognizes the technical right and immediately refuses to enforce it. It is, however, the most satisfactory holding yet found on the question.

Although nearly all courts recognize the existence of the lower proprietor's technical right it is suggested that the squarest way to face the issue is to deny the existence of a right to have the waters flow by in their customary way unless the diminution of the flow causes the lower owner material damage. This view has been taken in a few cases,<sup>18</sup> which defined an unreasonable use as such a use as caused actual damage to the lower proprietor and not such a use as interfered with his technical right.

Wm. Q. Boyce.

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SALES—SECOND-HAND MOTOR VEHICLES—EFFECT OF FAILURE TO COMPLY WITH STATUTORY REQUIREMENTS.—Should the sale of a second-hand motor vehicle without delivery of the license tax receipt

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<sup>15</sup>Note 10, *supra*.

<sup>16</sup>Also considered in 12 MICH. L. REV. 305, and 12 CALIF. L. REV. 322.

<sup>17</sup>Note 11, *supra*.

<sup>18</sup>*Elliot v. Fitchburg R. R. Co.* and *Harris v. Norfolk & Western R. R. Co.*, note 9, *supra*. While the railroad cases are sometimes separately classified there is no apparent basis for the distinction.

and of a bill of sale in the statutory form be held invalid and void, so that no title is passed to the vendee in the transaction? Should the parties be deprived of all rights in court on account of the illegality of non-compliance with the provisions of the statute?

There are two Texas statutes on the subject. The first<sup>1</sup> provides that whoever offers for sale a second-hand motor vehicle without having in his possession the license tax receipt for that vehicle, and whoever sells or buys a second-hand motor vehicle without delivering or obtaining the license receipt shall be subject to fine or imprisonment. The second<sup>2</sup> provides that whoever sells, trades or transfers a second-hand motor vehicle without delivering to the purchaser a bill of sale in duplicate in the form prescribed, shall be subject to fine. The fine in the second of these statutes is considerably less than in the first, there is no imprisonment authorized, and the penalty applies only to the seller; the buyer is not penalized for buying without securing a statutory bill of sale.

The purpose of these statutes, as declared in the caption of the bill containing both,<sup>3</sup> is "to prevent theft of motor vehicles." They were not designed to prohibit the sale of a second-hand automobile as an act *malum in se* or contrary to public policy, for, as was said by Judge Higgins of the El Paso Court of Civil Appeals,<sup>4</sup> "The sale of a second-hand motor vehicle is a perfectly legitimate transaction. It is only by virtue of the fourth section of the act of the Thirty-sixth Legislature that the sale must be evidenced in writing and by prescribed form." There is nothing in the statute which declares that the sale of a second-hand car without compliance with the statute shall be void, although such an express provision occurs in the statutes of some of the other states.

The Texas Courts of Civil Appeals have held that since the purpose of these statutes is to prevent theft of motor vehicles they should be strictly enforced;<sup>5</sup> that the law is mandatory and may not be evaded by innocent neglect;<sup>6</sup> that the courts will not enforce illegal contracts, but will leave the parties where they stand;<sup>7</sup> that a sale made without complying with the statutes is invalid and void and passes no title to the purchaser;<sup>8</sup> that having no title, the purchaser

<sup>1</sup>Art. 1434, PENAL CODE 1925; Arts. 1358d, e, f, COMP. TEX. STAT. 1920, P. C.; Acts 1919, ch. 138, secs. 3a, b, c.

<sup>2</sup>Art. 1435, PENAL CODE 1925; Art. 1358g, COMP. TEX. STAT. 1920, P. C.; Acts 1919, ch. 138, sec. 4.

<sup>3</sup>H. B. 417, HOUSE JOURNAL THIRTY-SIXTH LEGISLATURE, 1919, introduced by Tillotson, Lange, Laney and Murphy, with amendment by N. B. Williams.

<sup>4</sup>Mullin v. Nash-El Paso Motor Co., 250 S. W. 472 (El Paso Civ. App., 1923).

<sup>5</sup>Goode v. Martinez, *infra*; Ferris v. Langston, *infra*.

<sup>6</sup>Foster v. Beall, *infra*; Ferris v. Langston, *infra*.

<sup>7</sup>Foster v. Beall, *infra*; Chaddick v. Sanders, *infra*; Fulwiler v. Walker, *infra*.

<sup>8</sup>Overland Sales Co. v. Pierce, 225 S. W. 284 (Texarkana Civ. App., 1920); Goode v. Martinez, 237 S. W. 576 (San Antonio Civ. App., 1922); Foster v. Beall, 242 S. W. 1117 (Texarkana Civ. App., 1922); Chaddick v. Sanders,



has no insurable interest in the automobile;<sup>9</sup> that having no title, the purchaser can pass none to anyone else;<sup>10</sup> and that the courts will not enforce an illegal contract where the illegality appears in the plaintiff's proof, though such illegality be not pleaded in defense.<sup>11</sup>

Only one case involving these statutes has come before the Supreme Court. In that case<sup>12</sup> the judgment of the Court of Civil Appeals was reversed on other grounds, and no decision was made as to the construction put upon the statute by the Court of Civil Appeals when the case was before that court. The appellee had contended in the Court of Civil Appeals that since the sale of motor vehicles is not made illegal by the statute, but only the failure to comply with the law by delivering license receipt and bill of sale, the statute was not intended to prohibit the sale, but only to impose a duty collateral to the contract, and that failure to perform this duty does not render either the sale or the consideration illegal. This contention was overruled in the Court of Civil Appeals, but the appellee failed to file a writ of error asking for a reversal of the ruling. The Commission of Appeals in its opinion remarked that it could not pass on this contention, since it was not presented by writ of error, and by so doing distinctly left the question open for decision at some future time upon proper presentation of the issue. It is a clear inference that the Commission of Appeals did not wish to be taken as approving the holding of the Court of Civil Appeals on this question, for had it felt that the holding was correct, no mention of this contention would have been thought necessary.

The statutes of Missouri<sup>13</sup> declare the sale of a second-hand motor vehicle without compliance with the statutory requirements as to transfer of license receipt to be fraudulent and void, while those of California,<sup>14</sup> Iowa,<sup>15</sup> Nebraska,<sup>16</sup> and Oregon<sup>17</sup> provide that the sale shall be incomplete, delivery shall be deemed not to have been made,

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250 S. W. 722 (San Antonio Civ. App., 1923), reversed on other grounds, 267 S. W. 248 (Tex. Comm. App.); *Mullin v. Nash-El Paso Motor Co.*, 250 S. W. 472 (El Paso Civ. App., 1923); *Ferris v. Langston*, 253 S. W. 309 (Dallas Civ. App., 1923); *Fulwiler Motor Co. v. Walker*, 261 S. W. 147 (El Paso Civ. App., 1924); *Cullum v. Lub-Tex Motor Co.*, 267 S. W. 322 (Amarillo Civ. App., 1924); *Hennessy v. Automobile Owners' Ins. Assn.*, 273 S. W. 1024 (Beaumont Civ. App., 1925), writ of error granted Nov. 4, 1925; *Grapeland Motor Co. v. Lively*, 274 S. W. 168 (Beaumont Civ. App., 1925); *Tri-State Motor Co. v. King*, 277 S. W. 433 (El Paso Civ. App., 1925).

<sup>9</sup>*Hennessy v. Automobile Owners' Ins. Assn.*, *supra*.

<sup>10</sup>*Goode v. Martinez*, *supra*; *Cullum v. Lub-Tex Motor Co.*, *supra*.

<sup>11</sup>*Chaddick v. Sanders*, *supra*; *Mullin v. Nash-El Paso Motor Co.*, *supra*; *Fulwiler v. Walker*, *supra*; *Grapeland Motor Co. v. Lively*, *supra*.

<sup>12</sup>*Sanders v. Chaddick*, 267 S. W. 248 (Tex. Comm. App., 1924), reversing *Chaddick v. Sanders*, 250 S. W. 722 (San Antonio Civ. App., 1923).

<sup>13</sup>MISSOURI SESSION ACTS, EXTRA SESSION, 1921, p. 90.

<sup>14</sup>CALIFORNIA STATUTES 1919, p. 191, at p. 200.

<sup>15</sup>IOWA COMPILED CODE 1919, secs. 3061, 3063.

<sup>16</sup>NEBRASKA COMPILED STATUTES 1922, secs. 8375, 8377.

<sup>17</sup>OREGON LAWS 1920, sec. 4780.



and title shall not pass, until the provisions of the statute have been complied with.

The Missouri courts have not held directly that parties to a sale made without compliance with the statute are denied all rights in court, although this seems to be implied.<sup>18</sup> The California courts protect the rights of the purchaser by denying to the seller the right to invoke the statute and declare the sale void,<sup>19</sup> and by holding that the purchaser's possession under the sale, though it is invalid, is rightful, and will sustain trover<sup>20</sup> and case for negligent injury.<sup>21</sup> The purchaser is held to acquire an equitable title to the automobile.<sup>22</sup> In Iowa and Nebraska full protection is given to the rights of both parties,<sup>23</sup> though the sale is declared by statute invalid when the requirements are not complied with. Similarly in Oregon the court declares that there is nothing immoral or unlawful in the contract of the parties, and declines to hold that the law must leave the parties where it finds them.<sup>24</sup>

The statutes in Colorado,<sup>25</sup> Illinois,<sup>26</sup> Kansas,<sup>27</sup> Maryland,<sup>28</sup> New Jersey<sup>29</sup> and North Carolina<sup>30</sup> are similar to those in Texas in that no provision is made as to whether a sale in violation of the provisions of the statute shall be valid, voidable, incomplete or void. A statute in Minnesota providing that sales in violation of the act shall be voidable has been repealed.<sup>31</sup>

The Colorado Supreme Court has held that the sale is valid, though

<sup>18</sup>*Paragould Wholesale Grocery Co. v. Middleton*, 208 Mo. App. 592, 235 S. W. 469. See also *State ex rel. Conn. Fire Ins. Co. v. Cox*, 268 S. W. 87, 37 A. L. R. 1456 (Mo. Sup. St., 1924); *Muzenich v. McCain*, 274 S. W. 888 (Mo. Ct. App., 1925); *Platner v. Bourne*, 275 S. W. 590 (Mo. Ct. App., 1925).

<sup>19</sup>*Boles v. Stiles*, 188 Cal. 304, 204 Pac. 848 (1922); *Chucovich v. S. F. Securities Corp.*, 214 Pac. 263 (Cal. App., 1923).

<sup>20</sup>*King v. Cline*, 49 Cal. App. 696, 194 Pac. 290 (1920); *Moody v. Goodwin*, 53 Cal. App. 693, 200 Pac. 733 (1921).

<sup>21</sup>*Whitworth v. Jones*, 58 Cal. App. 492, 209 Pac. 60 (1922).

<sup>22</sup>*Goodman v. Anglo-California Trust Co.*, 62 Cal. App. 702, 217 Pac. 1078 (1923); *Parke v. Francisco*, 228 Pac. 435 (Cal. App., 1924). See also *Taylor v. Bernheim*, 58 Cal. App. 404, 209 Pac. 55 (1922); *Crandall v. Shay*, 61 Cal. App. 56, 214 Pac. 450 (1923).

<sup>23</sup>*Curry v. Iowa Truck & Tractor Co.*, 193 Iowa 397, 187 N. W. 36 (1922); *Wallich v. Sandlovich*, 111 Neb. 318, 196 N. W. 317 (1923).

<sup>24</sup>*Wiedeman v. Campbell*, 108 Ore. 55, 215 Pac. 885 (1923). See also *Swank v. Moisan*, 85 Ore. 662, 166 Pac. 962 (1917), and *Briedwell v. Henderson*, 99 Ore. 506, 195 Pac. 575 (1921).

<sup>25</sup>COLORADO LAWS 1919, ch. 7, sec. 7 (Extra Session); COMPILED LAWS 1921, secs. 1370, 1371.

<sup>26</sup>ILLINOIS: HURD'S STATUTES 1921, pp. 2817, 2823, c. 121, secs. 269s, 269zi.

<sup>27</sup>KANSAS LAWS 1919, ch. 88, secs. 9, 10.

<sup>28</sup>MARYLAND LAWS 1920, ch. 407.

<sup>29</sup>NEW JERSEY P. L. 1919, p. 357.

<sup>30</sup>NORTH CAROLINA P. L. 1923, ch. 236, secs. 3, 4.

<sup>31</sup>MINNESOTA LAWS 1919, ch. 510, repealed by LAWS 1921, ch. 472. See *Amick v. Exchange State Bank*, 204 N. W. 639 (Minn. Sup. Ct., 1925).

the statute be not complied with.<sup>32</sup> No cases have been found in Illinois construing the Illinois statute, and none seem to have been decided in Kansas on the Kansas statute. Twice the Kansas court has been called upon to apply the Missouri statute, and in the first of these cases the court remarked that the same result would have followed under the Kansas law, thus indicating in dictum that it would hold sales made in violation of the Kansas law to be void, though the statute does not declare them to be so.<sup>33</sup> The New Jersey Supreme Court has taken the opposite view from that taken by the Supreme Court of Colorado, and has held that the sale is void when made in violation of the statute, but has not gone to the extreme of holding that the parties have no rights in court.<sup>34</sup> Arriving at the same result as the Colorado court, and presenting an excellent statement of the reasoning upon which its decision is based, the North Carolina Supreme Court has held in a recent case<sup>35</sup> that the sale is valid, though the statute be not complied with, and that the parties are not denied their civil rights when the statute does not so provide and the transaction is valid in itself.

The purpose of all the statutes which we have reviewed is to prevent theft and fraud and to protect purchasers of second-hand automobiles by commanding the delivery of authentic instruments of title in connection with every sale. It is submitted that the penalty provided by the Texas legislature was the instrumentality with which

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<sup>32</sup>*Littell v. Brayton Motor & Accessory Co.*, 70 Colo. 286, 201 Pac. 34; *Williams v. Stringfield*, 231 Pac. 658 (Colo. Sup. Ct., 1924); *Forney v. Jones*, 231 Pac. 158 (Colo. Sup. Ct., 1924).

<sup>33</sup>*Hammond Motor Co. v. Warren*, 113 Kan. 44, 213 Pac. 810 (1923); *Miller v. Colonial Underwriters Ins. Co.*, 117 Kan. 240, 230 Pac. 1030 (1924). The only Maryland case, *Baughman v. Milstone*, 125 Atl. 69 (Md. App., 1923), does not decide the question of the validity of a sale in violation of the statute.

<sup>34</sup>In the leading case of *Stein v. Scarpa*, 114 Atl. 245 (N. J. Sup. Ct., 1921), rescission of the contract and return of his money was granted the purchaser; in *Arotzky v. Kropnitzky*, 98 N. J. L. 344, 120 Atl. 921 (1923), affirmed, 127 Atl. 923 (Sup. Ct., 1925), the seller was not allowed to recover the balance due, being held to have no right to enforce the contract; and in *McGlynn v. Ellis*, 123 Atl. 373 (Sup. Ct., 1923), the seller recovered the car. But in the most recent case, *Gaub v. Mosher*, 129 Atl. 253 (N. J. Ch., 1925), the chancery court seems to have repudiated this line of decision, for in granting a decree to the assignee of the vendee that the vendor deliver a bill of sale as promised, the court said:

The statute, however, does not say that a sale without compliance with its terms shall be void. On the contrary, by implication it negatives such a contention. It makes such a sale and purchase unlawful, and provides penalties for violations. Unless such a sale and purchase are made, there is no violation of its terms.

See also the recent case of *Edson & Co. v. Schuster*, 128 Atl. 602 (N. J. Sup., 1925), holding that a motor vehicle may be validly sold to satisfy a garagekeeper's lien, though the seller is unable to produce the manufacturer's bill of sale and subsequent assignments, as required by the statute. See also *Security Credit Corp. v. Whiting Motor Co.*, 98 N. J. L. 45, 118 Atl. 695 (1922); *Van Houton v. Gizang*, 127 Atl. 681 (N. J. L., 1925).

<sup>35</sup>*Carolina Discount Corporation v. Landis Motor Co.*, 129 S. E. 414 (N. C. Sup. Ct., 1925).

the legislative authority sought to accomplish this result, and that the holding of the Texas courts (that the sale is void and illegal and that the parties have no rights in court in connection with it) has not been effective to further the purpose of the statute, but has, on the contrary, opened wide the door to fraud, and has made defective the title to a great number of automobiles held under sales made by persons ignorant of the requirements of the law, but otherwise bona fide.

The result of theft prevention by delivery of papers with every sale, aimed at by the statute, is not attained by placing a risk of loss upon the parties through loss of their civil rights in court. It may be confidently asserted that those who will ignore the risk of a heavy fine or imprisonment will, when dealing with parties they believe to be honest, ignore also the possibility of losing their court rights in connection with the sale. The sale of a second-hand automobile is a legitimate transaction, those who have no knowledge of the statute have no reason to suspect that they are entering into an illegal sale when they do not comply with the requirements of the statute, for there is no trace of wrong involved, and those who do know of the statute rely upon their knowledge of the validity of the seller's title and in their anxiety to make the sale overlook the seller's inability to furnish the required license receipt. In addition to being ineffective to accomplish the purpose of the statute, the holding has created a great many anomalous situations, in many cases resulting in great injustice.

Such a situation arises after an attempted sale with cash paid and car delivered, where the parties have not complied with the statute, whether through ignorance of its provisions or otherwise. The vendee has possession of the car, but no title to it. The vendor has the purchase money, for which he has given no consideration, and the vendee is denied any action to recover it. The vendor still has title to the car, and may retake it if he can do so peaceably, but the court will not assist him in recovering it. The vendee has no insurable interest, and having no title can pass none to anyone else. Where only a part payment is made, the vendor has no right of action on the debt, or notes given therefor, while the vendee has no right to a rescission of the contract for fraud or mistake or to damages for breach of warranty. The Texas courts have repeatedly held that neither party has any rights in court, notwithstanding the following dictum in *Foster v. Beall*:<sup>86</sup> "The judgment, however, will be without prejudice to the right of the appellee to seek and secure equitable relief, upon proper pleadings, in another proceeding." These holdings present an opportunity to one who knows of the law to defraud those who do not, for whether the guilty party is buyer or seller, he may invoke the statute to avoid liability under his contract, no matter how just his obligation may be. No distinction has been attempted between parties who act in good faith and those who do not.

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<sup>86</sup>242 S. W. 1117 (Texarkana Civ. App., 1922).



In *Ferris v. Langston*<sup>37</sup> the court specifically refused to hold the vendor estopped from setting up the statute to show that the sale which he had made was void, and this holding, sweeping away the last opportunity to hold the defaulting party to his contract, has been followed in the later cases.<sup>38</sup>

Two illustrations of the injustice that may be visited upon a purchaser bona fide in all respects may be given. Suppose A sells to B for cash and immediate delivery, and B demands the license receipt and bill of sale, but both parties are in too much of a hurry to have them made out at the time. B accepts the car on A's promise to deliver the papers later. A refuses to carry out his promise. B has no rights in court to compel him to execute the papers, has no right to compel return of the money, and has a car to which he has no title. Suppose A sells to B without complying with the statute. B later makes an original registration of the car, pays the full license fee for a year, and sells to C, delivering his new license receipt and a bill of sale. C is a bona fide purchaser in all respects, but gains no title, for none has ever passed from A. A may not recover the car by legal proceedings, for he is denied all rights in court, but A's creditors may successfully levy upon the car in C's hands, since their rights are not derived through the sale, but are independent of it.

It is clear that since a great number of sales of second-hand automobiles made by private parties, and perhaps many sales made by dealers, are not in compliance with the statute, automobile titles are daily becoming more confused and unreliable. A probable failure of title is thus made an added deterrent to the prospective purchaser of second-hand automobiles, and the ruling which denies the validity of sales and the right of parties to enforce their equities in court thus tends to retard an important branch of the automobile industry.

Can the position of the Texas courts be sustained upon precedent or authority? The Texas statutes seem not to be based upon those of any other state, so no rule of construction from another state is binding as an adopted construction.

The only similar Texas statute cited as authority in the eleven Civil Appeals decisions construing the automobile statute (cited in Note 8)

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<sup>37</sup>253 S. W. 309 (Dallas Civ. App., 1923).

<sup>38</sup>An even further extreme was reached in the case of *Fulwiler Motor Co. v. Walker*, 261 S. W. 147 (El Paso Civ. App., 1924), where the only failure of compliance shown was failure of the purchaser to secure the statutory bill of sale. (The bill of sale requirement, as we have observed, is obligatory only upon the seller.) The purchaser sued the seller for breach of warranty, and the court held that the purchaser's right of action was defeated *on the ground that his pleading showed that he had failed to obtain the statutory bill of sale*. If this holding can be sustained at all, it may perhaps be upon the ground that the defendant's pleading showed, by means of a formal admission, that no license receipt had been delivered, the sale thus being rendered illegal as to both parties, but the ground upon which the court places the decision seems to be untenable. To the same effect see *Tri-State Motor Co. v. King*, 277 S. W. 433 (El Paso Civ. App., 1925).



is the live stock transfer law,<sup>39</sup> providing that sales of live stock where actual possession is delivered shall be accompanied by a bill of sale, possession of stock without such bill of sale being declared *prima facie* illegal, and that sales of live stock on the range must be accompanied by delivery of a bill of sale in order for title to pass. Since this statute specifically provides that the sale without bill of sale shall be valid in one case and invalid in the other, decisions under it are not authority as to whether title passes in sales under the automobile transfer law. The live stock cases<sup>40</sup> hold that the parties may enforce equitable rights acquired in an attempted sale in violation of the provisions of the live stock law, though the sale is invalid.

The cases cited<sup>41</sup> in *Foster v. Beall*<sup>42</sup> for the proposition that the courts will not enforce illegal contracts, but will leave the parties where they stand, are cases of contracts *malum in se*, being restraint of trade and breach of trust, respectively. Similarly, for the holding in *Fulwiler Motor Co. v. Walker*,<sup>43</sup> that it is not necessary to plead the illegality in defense if it appears in the course of plaintiff's pleading or proof, a case<sup>44</sup> involving violation of the Volstead Act is cited. Neither of these cases seems to be satisfactory authority for the holding for which they are cited, since the transaction involved is of a different kind.

Bona fide contracts not evil in themselves should be held valid, even though in connection with the contract a regulatory statute is violated, unless the statute expressly or impliedly declares them invalid.<sup>45</sup> Where the statute provides a penalty for its violation, but does not declare the contract to be invalid, the implication is that the contract is to be held valid.<sup>46</sup> Under the Texas assumed name

<sup>39</sup>REV. CIV. STAT., 1925, Art. 6903, REV. CIV. STAT., 1911, Arts. 7170, 7171; Acts 1866, p. 223.

<sup>40</sup>*Prude v. Campbell*, 85 Tex. 4, 19 S. W. 890 (1892); *Rankin v. Bell*, 85 Tex. 28, 19 S. W. 874 (1892). See also *Wells v. Littlefield*, 59 Tex. 561 (1883); *Black v. Vaughn*, 70 Tex. 47, 7 S. W. 604 (1888); *Nat. Bank v. Brown*, 85 Tex. 80, 23 S. W. 862 (1892).

<sup>41</sup>*Wiggins v. Bisso*, 92 Tex. 219, 47 S. W. 637, 71 Am. St. Rep. 837 (1898); *Seeligson v. Lewis*, 65 Tex. 215, 57 Am. Rep. 593 (1885).

<sup>42</sup>242 S. W. 1117 (Texarkana Civ. App., 1922).

<sup>43</sup>261 S. W. 147 (El Paso Civ. App., 1924).

<sup>44</sup>*Balaguer v. Macey*, 238 S. W. 322 (1922).

<sup>45</sup>*Dunlop v. Mercer*, 86 C. C. A. 435, 145 Fed. 545, 555 (1907), citing many Federal cases and *O'Hare v. Bank*, 77 Pa. 96 (1874), and *Pangborn v. Westlake*, 36 Iowa 546 (1873). *Chieppo v. Chieppo*, 88 Conn. 233, 235, 90 Atl. 940 (1914). 12 L. R. A. (N. S.) 575, 618, note, citing cases from Arkansas, Illinois (dissenting opinion), Indiana, Iowa, Kansas, Maryland, Massachusetts, Michigan, and Federal courts. *Biggs v. Reliance Life Ins. Co.*, 195 S. W. 174 (Tenn. Sup. Ct., 1917).

<sup>46</sup>*Sagal v. Fylar*, 89 Conn. 293, 93 Atl. 1027, L. R. A. 1915E, 747 (1915); *Fritts v. Palmer*, 132 U. S. 282, 33 L. Ed. 317, 10 Sup. Ct. 93 (1889); *In re T. H. Bunch Co.*, 180 Fed. 519, 527 (D. C., 1910); *Garratt Ford Co. v. Vermont Mfg. Co.*, 20 R. I. 187, 189, 38 L. R. A. 545, 78 Am. St. Rep. 852, 37 Atl. 948 (1897); *Toledo Tie & Lbr. Co. v. Thomas*, 33 W. Va. 566, 570, 25 Am. St. Rep. 925, 11 S. E. 37 (1890); *Williams v. Stringfield*, 231 Pac. 658 (Colo. Sup. Ct., 1924); *Amick v. Exchange State Bank*, 204 N. W. 639 (Minn.

statute,<sup>47</sup> similar to the automobile transfer statute in that it requires a form of notice for the protection of the public, contracts made without compliance with the statute are now held valid except when the innocent party is injured by the non-compliance, and parties are given full rights in court.<sup>48</sup>

It is submitted that when a case is presented to the Supreme Court directly involving construction of this statute, bona fide sales of second-hand automobiles should be held valid, even if made without compliance with the statute, and parties should not be denied access to the courts to enforce their legal and equitable rights simply because they have failed to comply with the statute in making their contract.

Vernon Elledge.

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SEARCH AND SEIZURE—THE CARROLL CASE VIEWED IN THE LIGHT OF LATER DECISIONS.—Is the decision of the Supreme Court in *Carroll v. U. S.*,<sup>1</sup> a departure from the rule of the *Boyd* and *Weeks Cases*?<sup>2</sup> That case in upholding the right of an officer to search an automobile without warrant on reasonable belief, but no actual knowledge, that liquor is being transported, has raised this question in the minds of members of the legal profession and of others interested in the processes of enforcement of the National Prohibition Act. Even in the decisions of the lower Federal Courts there is to be detected a note of uncertainty as to just what effect should be given to that decision. The recent case of *Agnello v. U. S.*,<sup>3</sup> however, shows clearly that the Supreme Court considers the problem of the search of vehicles to be an exceptional one, and that it intends no relaxation of the strict protection, under the Fourth Amendment, of dwellings and buildings from unreasonable searches.

In the *Agnello Case*, the several defendants were arrested in the home of one of them, Alba, by name. Federal officers had watched

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Sup. Ct., 1925); *Carolina Discount Corporation v. Landis Motor Co.*, 129 S. E. 414 (N. C. Sup. Ct., 1925); *Lane v. Henry*, 141 Pac. 365 (Wash. Sup. Ct., 1914); *Hughes v. Snell*, 28 Okl. 828, 115 Pac. 1105, 34 L. R. A. N. S. 1133, ANN. CAS. 1912D, 374 (1911); SUTHERLAND ON STATUTORY CONSTRUCTION, sec. 336.

<sup>47</sup>REV. CIV. STAT., 1925, Arts. 5924-5927; Acts 1921, p. 142.

<sup>48</sup>*Paragon Oil Syndicate v. Rhoades Drilling Co.*, not yet reported (Tex. Comm. App., Dec. 10, 1925), overruling *Loving v. Place*, 266 S. W. 231 (Tex. Civ. App., 1924). See RECENT CASES, page 250, *infra*.

<sup>1</sup>267 U. S. 132, 69 L. Ed. 347, 45 Sup. Ct. 280 (1925). A comprehensive review of this case and others bearing upon search and seizure under the Fourth Amendment of the Federal constitution is found in 3 TEXAS LAW REVIEW, 460.

<sup>2</sup>*Boyd v. U. S.*, 116 U. S. 616, 29 L. Ed. 746, 6 Sup. Ct. 524 (1885); *Weeks v. U. S.*, 232 U. S. 383, 58 L. Ed. 652, 34 Sup. Ct. 341 (1913). These decisions gave full effect to the Fourth Amendment as forever securing the people, their persons, houses, and papers and effects against all unreasonable searches and seizures under the guise of the law, and held that this right of security is not to be abridged or outweighed even by considerations of public interest.

<sup>3</sup>46 Sup. Ct. 4 (1925).

through the windows of a house an illegal sale of cocaine, and upon its consummation had, without warrant, entered and made the arrests. The defendants had brought the cocaine into Alba's house just prior to the sale, and were known by the officers to have come directly from the home of another of the defendants, one Frank Agnello. While some of the officers were taking the defendants to the police station, others searched the home of Agnello without warrant and found a can of cocaine which upon trial was used in evidence against all the defendants. The Supreme Court citing *Boyd v. U. S.*, and *Weeks v. U. S.*, and other cases, held that the search and seizure were illegal and that the cocaine found was inadmissible against Agnello. The government sought to uphold the legality of the search on the authority of the *Carroll Case*, but the court denied this contention, making the following statement:

The protection of the Fourth Amendment extends to all equally,—to those justly accused as well as to the innocent. The search of a private dwelling without warrant is in itself unreasonable and abhorrent to our laws. Congress has never passed a law purporting to authorize the search of a house without a warrant. . . . Save in certain cases as incident to arrest there is no sanction in the decisions of the courts, Federal or State, for the search of a private dwelling house without a warrant.

The courts have always recognized the right of an officer without a warrant to enter a house for the purpose of making an arrest, and to arrest the person, if and when he is committing an offense in the presence of the officer, and, further, to search him and the premises for the fruits and evidence of the crime. It is said that if the entry is lawful, the search and seizure are lawful.<sup>4</sup> But will the search and seizure be justifiable if no arrest is made? It is suggested that the fact that the offense is being committed in the officer's presence will not justify the entrance of a house solely for the purpose of search and seizure, but that these follow only as incident to the entrance to make the arrest. In the case of *U. S. v. Lindsly*,<sup>5</sup> decided by a Federal District Court of Louisiana, subsequent to the *Carroll Case* but prior to the *Agnello Case*, the officer looking from the neighboring yard saw a man overturning containers of liquor. As the officer entered the front of the premises, the man saw him and fled over the back fence. After pursuing him for several blocks, the officer returned and with other officers searched the premises, seized and destroyed much of the wine and mash found. Was his re-entry lawful after the offender had escaped? Could he have re-entered an hour later? A day later? Or if the officer had seen the offender leave the premises before his own entrance, would his entrance have

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<sup>4</sup>*McBride v. U. S.*, 284 Fed. 416 (1922); *Weeks Case*, *supra*; *Tritico v. U. S.*, 4 Fed. (2d), 664 (1925).

<sup>5</sup>7 Fed. (2d), 247 (1925).



been justifiable? Certainly his entrance would not then have been for the purpose of making the arrest.

The court in upholding the admission of the evidence in the *Lindsly Case* relied principally upon *Gouled v. U. S.*,<sup>6</sup> *McBride v. U. S.*,<sup>7</sup> and the *Carroll Case*. If in relying on the *McBride Case*, the court had clearly distinguished between the acts of an officer in making a search as incident to or following an arrest, and acts in searching for evidence and seizing goods when a crime is committed in his presence, without an arrest and independent of his right to arrest, and had justified the admission of the evidence in this case because secured after the lawful entrance for the purpose of making an arrest, then the decision could not have been questioned. The following statement seems to be the heart of the decision in the *McBride Case*:

The entry on the premises and into the stable was *not to search for evidence*, but upon ascertaining that whiskey was in the process of manufacture, to *arrest* those engaged in the commission of an offense then in progress.<sup>8</sup>

But the language in the *Lindsly Case* does not make this clear-cut distinction and from the generality of its statement it is difficult to believe that the court had it in mind.

The court quoted a part of the opinion of *Gouled v. U. S.* in which it was stated that search warrants could not be issued as a means of getting access to a man's house, office, or papers solely for the purpose of securing evidence and that they could be resorted to only when there is a *primary right* of search and seizure by reason of the interest the public or the complainant has in the property, or when a valid exercise of the police power renders the possession of the property by the accused unlawful. The court then went on to state that although it is true that in the *Gouled Case* reference was made to search warrants, while in the case at bar there was no search warrant, still the court in that case pointed to the difference between gaining access to a man's house solely for the purpose of securing evidence to be used against him, and gaining access when there is a *primary right* to search and seize property such as liquor and other articles declared to be contraband. This statement is correct; the court there did point to this difference. The very distinction the court was making was that this *primary right* referred to did exist, but that a warrant was necessary for its exercise, while the right to search only for evidence did not exist at all. Nowhere would its language justify or support the conclusion that in either circumstance the search could be made without a warrant. So the opinion in the *Lindsly Case* would certainly have been less susceptible of criticism if the court had stated clearly that it justified the search without warrant only as incident to the entry for the purpose of an arrest.

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<sup>6</sup>255 U. S. 298, 65 L. Ed. 647, 41 Sup. Ct. 265 (1920).

<sup>7</sup>Note 4, *supra*.

<sup>8</sup>*Ibid*, 419. Italics mine.



The court also quoted extensively from the *Carroll Case*. As the facts are not similar in any respect, it is difficult to see why it should have even been referred to unless the court was of the opinion that the same principles were involved in both cases and the same rules applicable to both. Some of the quotations, made from the former, are as follows:

In none of the cases cited is there any ruling as to the validity under the Fourth Amendment of seizure without warrant of contraband goods in the course of transportation and subject to forfeiture or destruction. . . . In cases where seizure is impossible except without a warrant the seizing officer acts unlawfully and at his peril unless he can show the court probable cause. . . . The right to search and the validity of the seizure are not dependent on the right to arrest. They are dependent on the reasonable cause the seizing officer has for believing that the contents of the automobile offend against the law.

These statements are certainly sound as applied to the facts of that case. It is not to be doubted, however, that the question of search of private dwellings or other buildings is very different from that of search of automobiles or other vehicles of transportation, and that the Supreme Court recognizes and is guided by entirely different rules and considerations in the two kinds of cases. But it is submitted that the court in the *Lindsly Case* by its language, at least, if not by its actual holding, failed to limit the rules laid down in the *Carroll Case* to the specific circumstances of seizure of liquor in transportation, as the Supreme Court intended they should be limited. Where an officer searches a vehicle and seizes contraband goods without a warrant, his action is justifiable under the Fourth Amendment if he has reasonably *trustworthy information of facts and circumstances* which would warrant a man of reasonable caution in the belief that liquor was being transported. The arrest may then follow the seizure. But in order for the arrest to have been legally made in the first place, before the search, it would have been necessary for the officer *by means of his own senses* to have known of the commission of an offense in his presence. And so in the case of arrest in a private dwelling and of all arrests and searches other than where liquor or other goods are being illegally transported, the arrest without warrant, except of course, in case of the arrest of a felon, must be made under such circumstances that the officer by his senses knows of the present commission of the offense. The search of the accused and of the premises without warrant then may follow as incident to, and *only as incident to the arrest*. In such case the legality of the search depends upon the legality of the arrest.<sup>9</sup> These, it is submitted, are

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<sup>9</sup>The very interesting question has been raised as to whether a search and seizure of liquor by an officer is reasonable when the arrest was made for the commission of an entirely different offense. The Supreme Court of Indiana in *Haverick v. State*, 147 N. E. 625 (Ind., 1925), and *Jameson v. State*, 149 N. E. 51 (Ind., 1925), has held that a person lawfully arrested for speeding may be searched without warrant and the search may extend to the automobile.

the rules to be gathered from the decisions by the Supreme Court—in the *Boyd Case*, the *Weeks Case* and the *Carroll Case*, which were adhered to in the *Agnello Case*. In each of them the court was determining what was or was not, under the particular set of circumstances, *unreasonable search or seizure* as prohibited by the Fourth Amendment. Certainly the same rules for reasonableness of conduct in the search of moving vehicles will not necessarily be the rules for reasonableness in the search of a private dwelling. It is on this basis that the *Carroll Case* is to be distinguished from other cases referred to. It does not weaken nor limit the force of their holdings.

*Sterling C. Holloway.*

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and liquor so discovered is admissible in evidence in a prosecution for transportation of liquor. These holdings were made in the application of a constitutional provision identical with the provision in the Fourth Amendment of the Federal constitution.

## RECENT CASES

**ADMIRALTY—JURISDICTION IN TORT.**—A wharf, owned and operated by the respondent, collapsed because of negligence, and goods of the libelants, previously unloaded from a vessel and then on the wharf, fell into the navigable waters of a bay and were thereby lost or damaged. Held, that a suit for the damage is cognizable in admiralty. *Fireman's Fund Ins. Co. v. City of Monterey*, 6 Fed. (2d) 893 (C. C. A., 1925).

The case raises two problems: 1. Is locality the sole test for admiralty jurisdiction in tort? 2. Under what circumstances does a tort occur on the High Seas or navigable waters of the United States? This decision is based on a view that the sole test of admiralty jurisdiction in tort is locality, i. e., the tort is maritime if it occurs on the navigable waters of the United States or on the High Seas. That locality is a test for jurisdiction was first decided by the Supreme Court in *The Plymouth*, 70 U. S. (3 Wall.) 20, 18 L. Ed. 125 (1886). But it has been held that the fact of locality alone does not give jurisdiction and, that it must further appear that the injury is maritime in character. *Campbell v. H. Hackfield & Co.*, 125 Fed. 696 (1903), cf. *Atlantic Transport Co. v. Imbrovek*, 234 U. S. 52, 58 L. Ed. 1208, 34 Sup. Ct. 733, 51 L. R. A. (N. S.) 1157 (1914). It has been held that injuries sustained on a vessel in dry dock are of admiralty cognizance. *The Anglo-Patagonian*, 235 Fed. 92 (1916); *contra*, *The Warfield*, 120 Fed. 847 (1903). While the Supreme Court has never definitely decided that locality is the sole test, it has been held that an injury incurred on navigable waters, by one not engaged in maritime work, is within admiralty jurisdiction. *Grant Smith-Porter Ship Co. v. Herman F. Rohde*, 257 U. S. 469, 66 L. Ed. 321, 42 Sup. Ct. 157 (1922). This latter decision tends to support the view that locality is the sole test, as there the injury was received on board a vessel launched, but in the course of construction and hence not yet an instrument of maritime commerce.

Admitting locality to be the sole test, is it the locality of the act or "failure to act"; the place the act or "failure to act" began to take effect; or the locality of the ultimate injury or damage? All of the cases seem to agree that the fact that the act takes place upon maritime waters does not confer jurisdiction. It has been stated that the test is the locality of the person or thing injured at the time of impact with the intentional or negligent force. *Ex parte Phoenix Ins. Co.*, 118 U. S. 610, 30 L. Ed. 274, 7 Sup. Ct. 25, 28 (1886), cf. *The Strabo*, 39 C. C. A. 375, 98 Fed. 998 (1900). In *The Plymouth* it was stated that the tort must have been consummated upon navigable waters or the High Seas. As there can be no actionable wrong for negligence in admiralty, or at common law, without actual damage to the res, it would seem that if the damage is consummated, at least in part on its inception, on navigable waters of the United States or on the High Seas, the cause of action would be maritime as it first comes into existence within admiralty jurisdiction. This, of course, is the result reached in the principal case.

In *Johnson v. Chicago and P. Elevator Co.*, 119 U. S. 338, 30 L. Ed. 447, 7 Sup. Ct. 254 (1886), the jib boom of a ship was negligently driven through the wall of an elevator, causing grain to fall into navigable waters. The fact that it was held that admiralty did not have jurisdiction of the injury

to the grain, might give rise to the opinion that the decision is in conflict with that of the principal case. But there the damage to the elevator, on land, preceded that to the grain, the damage to both giving rise to one cause of action. In the present case there was no damage on land, and hence no cause of action, until the goods were injured by falling into navigable water.

A. J. E.

**CARRIERS—LIABILITY OF ELEVATOR OPERATOR.**—The jury found that the elevator operator was negligent in closing the door on the plaintiff before she was fully out of the cage although she had not asked to be let out on that particular floor. *Held*, that elevator operator, the same as a train operator, is required to exercise the highest degree of care to prevent injuring those entering or leaving the elevator. *City National Bank v. Pigott*, 270 S. W. 234 (Tex. Civ. App., 1925).

That a common carrier is required to use the highest degree of care and skill that a prudent man would exercise under the circumstances is well settled. *Trinity & B. V. Ry. Co. v. McDonald*, 208 S. W. 912 (Tex. Comm. App., 1919). Whether an elevator is a common carrier of passengers is a question on which the courts are divided. The minority holding is that an operator of a passenger elevator is a common carrier, and hence is required to exercise the highest degree of care. *Lee v. Publisher: George Knapp & Co.*, 155 Mo. 610, 56 S. W. 458 (1900); *Russo v. Morris Building & Land Improvement Assn.*, 104 La. 438, 29 So. 46 (1900); *Springer v. Ford*, 189 Ill. 430, 59 N. E. 953, 52 L. R. A. 930, 82 Am. St. Rep. 464 (1901). Rhode Island, New York, and Michigan base liability upon failure to use only ordinary care under the circumstances. *Edwards v. Manufacturing Building Co.*, 21 R. I. 248., 61 Atl. 646, 2 L. R. A. (N. S.) 744 (1905); *Stott v. Churchill*, 15 Misc. 80, 36 N. Y. Supp. 476 (1895); *Burgess v. Stowe*, 134 Mich. 204, 96 N. W. 29 (1903). It is submitted that there is no difference between the two rules of care, and the classification of degrees of care is merely an attempt at saying that the precaution required in every case is dependent on the dangers involved. *Pomroy v. Bankor & Aroostook R. R.*, 102 Me. 497, 67 Atl. 561 (1907); *Denver & Rio Grande R. R. v. Peterson*, 30 Colo. 77, 69 Pac. 578 (1902). A reasonably prudent person would, under the circumstances, use the highest degree of care; and it is merely an attempt to impress this fact on the jury that leads courts to incorporate the more emphatic statement in their charges.

Texas courts and the majority of courts in other jurisdictions also place the same extraordinary liability upon elevator operators as is placed upon common carriers. *Treadwell v. Whittier*, 80 Cal. 574, 22 Pac. 266, 5 L. R. A. 498, 13 Am. St. Rep. 175 (1889); *Farmers and Mechanics National Bank v. Hank et al.*, 104 Tex. 320, 137 S. W. 1120, Ann. Cas. 1914B 368 (1911). These courts, however, hold that the operation of an elevator lacks certain essential elements necessary to constitute a common carrier in that an elevator operator is not required to carry any or all persons who may apply, *Farmers and Mechanics National Bank v. Hank et al.*, *supra*, and that the carriage is gratuitous in that no direct compensation is received from the person carried. *Bigby v. United States*, 103 Fed. 597 (1900). The liability of a common carrier of passengers is predicated on the extreme danger incident to its occupation and on the inability of self-aid on the part of the passenger. The similarity, not in the nature of the business as might be inferred from the opinion in the principal case, but in the dangerous character of the two businesses, is truly the basis for the like rule of liability. *Treadwell v. Whittier*, *supra*.

E. R.



CONFLICTS OF LAW—CAPACITY OF MARRIED WOMEN TO CONTRACT—WHERE SUIT BROUGHT AT DOMICILE OF MARRIED WOMAN.—Defendant, a married woman domiciled in Texas, while temporarily in California contracted to sell real estate, her separate property located in that state, to the plaintiff. Time was made of the essence, and defendant was to have the right to refuse to convey the property and to forfeit all moneys paid if the plaintiff failed to comply with the contract. The plaintiff failed to make the last payment, and the defendant relying on the contract sold the land to a third party, and refused to refund the money paid. Suit was brought in a Texas court for damages for breach of the contract. *Held*, notwithstanding the general rule in personal contracts that capacity is governed by the *lex loci contractus*, that where a married woman's obligation is sought to be enforced at her domicile, the court will refuse to give it effect when the public policy of the forum is opposed to such contracts. *Taylor v. Leonard*, 275 S. W. 134 (Tex. Civ. App., 1925).

It is to be noted that the Texas court in refusing to allow the plaintiff to recover did not base its decision on the ground that the vendor had not breached the contract in refusing to return the purchase money, but rather put the decision on the ground that such a contract would not be enforced against a married woman who is a citizen of Texas, she not having capacity to make such a contract under the Texas law. This doctrine was first announced in the North Carolina case of *Armstrong v. Best*, 112 N. C. 59, 17 S. E. 14, 25 L. R. A. 188 (1893). It has been followed by courts and text-writers as an exception to the general rule that capacity to make personal contracts is governed by the *lex loci contractus*. *Thompson v. Taylor*, 65 N. J. L. 107, 46 Atl. 567 (1900); *Bank v. Shaw*, 109 Tenn. 237, 70 S. W. 807 (1902); MINOR, CONFLICTS OF LAW, Sec. 72; WHARTON, CONFLICTS OF LAW, Sec. 118. Formerly, capacity to contract was governed by the law of the domicile of the parties contracting; but since the case of *Millikan v. Pratt*, 125 Mass. 374, 28 Am. Rep. 241 (1877), it has become well recognized that the *lex loci contractus* governs. Notwithstanding the clear-cut decision in *Millikan v. Pratt*, *supra*, that the law of the place of contracting governs, dictum in the opinion clearly gave a basis for the doctrine announced later in *Armstrong v. Best*, *supra*. Other courts under the same fact situations as in the principal case have recognized this exception but refused to follow it on the ground that it was not against public policy when the suit was brought because of a subsequent statutory change by which the disabilities of married women had been removed. *Bank v. Mitchell*, 34 C. C. A. 542, 92 Fed. 565 (1899); *Insurance Co. v. Simons*, 52 Mo. App. 357 (1892); *Bingham v. Gilmartin*, 58 N. H. 346 (1878).

The doctrine which the court followed in the principal case might be seriously questioned today on the ground that it would be better public policy to follow the general rule as to capacity and thus lead to more uniform results in conflicts of law cases than for a state to protect its married women from the effect of contracts made outside the state and which are valid where made. In the principal case the defendant if sued in California or a third state would not have been able to set up her coverture as a defense to the action. Thus the decision under discussion reaches a result that would not be reached in any other jurisdiction, and thus does away with what would seem to be a desirable result, that is, uniformity. However, as this doctrine is not a late creation of the courts and has received the sanction of many jurisdictions, it is a rule that will probably be followed until legislative authority directs them to do otherwise. The Texas court did not apply the rules which ordinarily govern contracts relating to land, but applied those rules which govern personal contracts, for the doctrine announced

by this case has heretofore been applied merely as to capacity in personal contracts.

F. T. P.

CONSTITUTIONAL LAW—POWER OF GOVERNOR TO ENLARGE SUBJECTS AT A SPECIAL SESSION BY A SUPPLEMENTAL ORDER BEFORE LEGISLATURE CONVENES.—The Governor of Arkansas issued a supplemental order setting forth additional subjects for consideration by the legislature which he had already called to meet in special session. Plaintiff contends that the supplemental order was unconstitutional and that a certain statute, the subject of which was recommended therein, was invalid under Article 6, Section 19, of the Arkansas constitution, which provides that the Governor may issue a proclamation calling a special session, and that he "shall specify the purpose for which they are convened, and no other business than that set forth therein shall be considered." *Held*, that the power of the executive over the form of his proclamation continues until the legislature has actually convened, and that the statute was valid. *Foster v. Graves*, 275 S. W. 653 (Ark., 1925).

Some states, as Connecticut, have no constitutional limitations on legislative power at a special session except those applicable to a regular session. Other states by their constitutions restrict the lawmaking powers of the legislature in special session to subjects submitted by the governor in his proclamation. Art. IV, Sec. 3 (Subd. 2), ARIZ. CONST.; Art. 6, Sec. 19, ARK. CONST. Other states by their constitutions allow additional subjects to be submitted after the legislature convenes. Art. III, Sec. 40, TEX. CONST. The question of the power of the legislature to enact laws at a special session has frequently arisen in Texas. However, inquiry has been directed to a comparison of the nature of the legislation enacted with that embraced in the call or the message of the governor. In these cases the rule seems to be that the governor's authority to restrict the subject matter at special session is exhausted when he has submitted the general topic, and that the legislature is free to act at will either in whole or in part within the scope of this subject matter. *Baldwin v. State*, 21 Tex. Cr. App., 591, 3 S. W. 109 (1886); *Long v. State*, 58 Tex. Cr. Rep. 209, 127 S. W. 208 (1910).

The principal case involves the definition of the term "proclamation" in the Arkansas constitution, and holds that the power of the legislature to act is not confined to the subjects set forth in the original proclamation of the governor, but that additional subjects later recommended by the governor merge into and become a part of the original proclamation. This exact question is not likely to arise in Texas, due to the fact that unlike the Arkansas constitution, the Texas constitution, in Article III, Section 40, provides that after the legislature has convened, the governor may recommend additional subjects for their consideration.

R. T. M.

CONSTITUTIONAL LAW—RIGHT OF ACCUSED TO A SPEEDY TRIAL.—The grand jury of Van Zandt County returned two indictments against A for the murder of B and C. A was tried and convicted of the murder of B and sentenced to the penitentiary for life, but no action was taken by the State within a reasonable time with regard to the indictment for the murder of C. A, claiming his right under Art. 1, Sec. 10, of the state constitution to a speedy trial, petitioned the District Court of Van Zandt County that he be tried upon the second indictment. The district judge, after first intimating that there was no process known to the laws of the state by which the prison officials could be compelled to release the prisoner to stand trial in another cause, recognized the propriety of a bench warrant but refused to issue it

on the grounds that issuance was a matter of judicial discretion. The petitioner filed application with the Supreme Court of the state for a writ of mandamus. *Held*, that a writ of mandamus be issued directing the district judge to issue a bench warrant for the relator on the ground that the right of the accused to a speedy trial was a fundamental right guaranteed by the constitution and could not be made the subject of judicial discretion. The court, in anticipation of a refusal by the prison authorities to comply with the bench warrant, stated that in event such a situation did arise that adequate remedy would be had upon proper application being made. *State v. Bond*, 271 S. W. 379 (Tex. Sup. Ct., 1925).

The intimation of the Supreme Court that an adequate remedy would be afforded the accused should the prison authorities refuse to recognize the bench warrant is open to two interpretations. First, that there is a remedy separate and distinct from the bench warrant; or, second, that there would be a means of enforcing recognition of the bench warrant despite such refusal. The writ of habeas corpus was proposed by the district judge as an independent means, but an examination of the authorities does not support his suggestion. The Texas Court of Criminal Appeals has held that the writ of habeas corpus is only available where the petitioner is illegally restrained. *Ex parte J. H. Talbutt*, 39 Tex. Crim. Rep. 12, 44 S. W. 832 (1898). In *Ex parte F. H. Coupland*, 26 Tex. 387 (1862), it was stated that, "... the party's right to the writ depends . . . upon the legality or illegality of his present detention. . . ." In *Ex parte Spagnoli*, 53 Calif. App. 523, 200 Pac. 836 (1921), a case having substantially the same facts as the instant case, the prisoner petitioned for a writ of habeas corpus to procure his release. The court held that the prisoner was not in a position to avail himself of the proceedings in habeas corpus but that he should have proceeded in mandamus. An examination of the writ itself shows it to be no more than an order for the one to whom it is directed to show cause why he detains the petitioner, and were the writ issued in the present case, production by the prison authorities of the sentence of the relator would satisfy the order to show cause for his detention. It would seem, then, that the writ would not be available in the present case as an adequate independent remedy within the meaning of the court.

The other interpretation, that is, that further steps would be taken, if necessary, to secure the enforcement of the bench warrant, is probably what the court had in mind. The holding that fundamental rights guaranteed by the constitution cannot be made the subject of discretion, would apply not only to judges but to all officers, including the prison authorities. The duty of the prison authorities to recognize and enforce the rights of the accused is therefore made mandatory. A clear legal right, the recognition of which is mandatory upon an officer, will be enforced by writ of mandamus. *De Poyster v. Baker*, 89 Tex. 155, 34 S. W. 106 (1896). It would seem to follow that the prison officials would be subject to mandamus should they fail to recognize the bench warrant, and then, upon further refusal, subject to punishment for contempt.

J. D.

CONTRACTS—ASSUMED NAME STATUTE—FAILURE TO COMPLY WITH STATUTE DOES NOT INVALIDATE CONTRACT.—Rhoades Drilling Company, a partnership, sued the Paragon Oil Syndicate to recover the amount due on a contract for drilling two oil wells. Defendant pleaded in abatement that the plaintiff had not complied with the provisions of Chapter 73, GENERAL LAWS OF TEXAS, Thirty-seventh Legislature, 1921, Arts. 5924-5927, REV. CIV. STAT. 1925, Arts. 1067-1070, PENAL CODE 1925), requiring filing for record with the county clerk a certificate setting forth the names of those conducting or transacting business



under the assumed name. *Held*, the contract is valid, notwithstanding plaintiff's failure to comply with the statute. *Paragon Oil Syndicate v. Rhoades Drilling Co.* (Tex. Comm. App., 1925, not yet reported).

This decision definitely establishes in Texas a liberal rule for the construction of contracts in the making of which a regulatory statute is violated. It is in conflict with and by necessary implication overrules *Loving v. Place*, 266 S. W. 231 (Tex. Civ. App., 1924) (discussed in 3 TEXAS LAW REVIEW 325), and *Bristol v. Noble Oil & Gas Co.*, 273 S. W. 946 (Tex. Civ. App., 1925). See comment on the Texas assumed name statute by Dean Hildebrand in 2 TEXAS LAW REVIEW 178.

At common law the ground on which contracts were held illegal and void was that they were contrary to public policy; under a statute expressly forbidding the transactions it is sufficient that they are contrary to the statute, and immaterial whether they are contrary to public policy, contrary to morality, or prohibited as a means of regulation. *Diamond Match Co. v. Roeber*, 106 N. Y. 473, 13 N. E. 419, 50 Am. Rep. 464 (1887); *Hunt v. Robinson*, 1 Tex. 748 (1847); 3 WILLISTON, CONTRACTS, Sec. 1628. In general, where the statute does not forbid the making of the contract, but imposes a penalty on whoever enters into it, the contract is held to be void just as if it were expressly prohibited. *Harris v. Runnels*, 12 How. 79, 13 L. Ed. 901 (1851); *Youngblood v. Trust Co.*, 95 Ala. 521, 12 So. 579, 20 L. R. A. 58, 36 Am. St. Rep. 245 (1892). But where the statute imposes a penalty for making the contract without complying with statutory provisions, the validity of the contract has been held to depend upon the intent of the legislature: if the measure is purely for revenue, it will be implied that it was not intended to prohibit the contracts themselves: *Smith v. Mawhood*, 14 Mees. & W. 452 (1845); *Straus v. Minzesheimer*, 78 Ill. 492 (1875); where the contract is regulatory it is usually said to be in the exercise of the police power, and contracts violating such a statute have generally been held invalid. *Deaton v. Lawson*, 40 Wash. 486, 82 Pac. 879, 2 L. R. A. (N. S.) 392, 111 Am. St. Rep. 922 (1905); *Miller v. Ammon*, 145 U. S. 421, 12 Sup. Ct. 844, 36 L. Ed. 759 (1891). It is on this ground that contracts made in violation of the assumed name statute have been held invalid in Kentucky, North Carolina, Michigan, and Indiana. *Hunter v. Patterson*, 162 Ky. 778, 173 S. W. 120, L. R. A. 1915D 987 (1915). But in Indiana it is now indicated that it may be sufficient if the certificate is filed before suit. *Humphrey v. City Nat. Bank*, 130 N. E. 273 (Ind., 1921). And in North Carolina an amendment to the statute provides that failure to comply shall not bar the right to prosecute civil suits. *Williamson Real Estate Co. v. Sasser*, 103 S. E. 73 (N. C., 1920).

But contracts not *malum in se* have been held valid though in violation of a regulatory statute when it appeared that public policy required their enforcement. *Lester v. Howard Bank*, 33 Md. 558, 3 Am. Rep. 211 (1870); *Penn v. Bornman*, 102 Ill. 523 (1882) (see additional cases cited in 12 L. R. A. (N. S.) 575, at p. 618), or where it could be inferred that the intention of the legislature was that the contracts should be held valid. *Pangborn v. Westlake*, 36 Ia. 546 (1873); *Bowditch v. Insurance Co.*, 141 Mass. 292, 4 N. E. 798, 55 Am. Rep. 474 (1886); *Pennypacker v. Insurance Co.*, 80 Ia. 56, 45 N. W. 408, 8 L. R. A. 236, 20 Am. St. Rep. 395 (1890); *Carolina Discount Corp. v. Landis Motor Co.*, 129 S. E. 414 (N. C. Sup. Ct., 1925). Where a contract is not evil in itself and the statute does not pronounce it invalid, but provides other penalties, it is held that the court should not impose the additional penalty of invalidating the contract. *Dunlop v. Mercer*, 156 Fed. 545 (1907); *Biggs v. Reliance Life Insurance Co.*, 195 S. W. 174 (Tenn. Sup. Ct., 1917). Upon this theory the courts of New York, New Jersey, Louisiana, Connecticut, Illinois, Pennsylvania, and British Columbia



have held failure of the plaintiff to comply with an assumed name statute to be an insufficient defense, in the absence of injury through reliance on the fictitious name. *Gay v. Seibold*, 97 N. Y. 472, 49 Am. Rep. 533 (1884); *Lamb v. Condon*, 120 Atl. 546 (Pa., 1923); *Smith v. Finch*, 12 B. C. 186 (1905); 3 WILLISTON, CONTRACTS, Sec. 1774. In several states failure to comply with the statute goes only to the party's capacity to sue, and it is sufficient if the necessary papers are filed before beginning the action. *North v. Moore*, 135 Cal. 621, 67 Pac. 1037 (1902); *Peterson v. Morris*, 205 Pac. 408 (Wash., 1922); *Wilson v. Tudor*, 95 Atl. 794 (Vt., 1915). See annotation, L. R. A. 1915D 987.

The principal case correctly follows the New York line of decisions and reaches the sound result of holding bona fide contracts valid, though in the making of them the parties violate a statutory regulation. An important and commendable feature of the opinion is a dictum to the effect that such a contract may be avoided at the instance of a party who was injured by failure of the other party to comply with the statute.

It will be noticed that in the revision of 1925 the words "and until he has filed such certificate he shall remain liable for all debts incurred in the operation of said business" have been omitted from the article providing for registration of a certificate showing withdrawal from the business. The effect of this omission has not yet been passed on by the courts.

V. E.

CONTRACTS—MISTAKE AS TO THE IDENTITY OF THE ADVERSARY PARTY.—Plaintiff at Comanche called defendant at Waco, over long distance telephone, and proposed the sale of 100 bales of cotton. Defendant, thinking that he was talking to one Brightman, with whom he had transacted business for years, accepted the offer. Defendant, learning of the mistake, refused to perform. *Held*, that, no facts being shown to justify defendants in refusing to perform, if they desired to avoid the contract, which they had made, because of mistaken identity it was necessary to allege and prove same as an affirmative defense. *K. Tideman & Co. et al. v. McDonald*, 275 S. W. 70 (Tex. Civ. App., 1925).

The fundamental and distinguishing characteristic of the contractual obligation is that it is based on the consent of the contracting parties. *Arkansas Valley Smelting Co. v. Belden Min. Co.*, 127 U. S. 379, 32 L. Ed. 246, 8 Sup. Ct. Rep. 1308 (1888); *Hubbard City Cotton Oil & Gin Co. v. Nichols*, 89 S. W. 795 (Tex. Civ. App., 1905); ANSON ON CONTRACTS, 8th ed. 163. There must, then, be mutual assent, or actions which the law will treat as taking the place of mutual assent. 3 COL. L. REV. 71. It necessarily follows that any justifiable mistake or misunderstanding by the parties as to a material feature of the proposed contract is fatal, because there is neither mutual assent nor conduct which is its equivalent. The materiality of the identity of the adversary party has been considered in a number of cases. In many the party who is misled has a strong motive for not wishing to deal with the party with whom he is in fact dealing, and the identity of such party is clearly material. *Boulton v. Jones*, 2 H. and N. 564 (1857); *Boston Ice Co. v. Potter*, 123 Mass. 28, 26 Am. Rep. 9 (1877). But at the same time it seems that it is unnecessary to show any motive on the part of the one who is misled in order to enable him to treat the contract as void. *Boston Ice Co. v. Potter*, *supra*; PAGE ON CONTRACTS, 2d ed., Sec. 225. Where the offerer has in contemplation a definite person with whom he intends to contract, only such a person can accept the offer, and acceptance by another has no legal effect. *School Sisters v. Kusnitt*, 125 Md. 323, 93 Atl. 928, L. R. A. 1916D, 792 (1915); *National Bank v. Hall*, 101 U. S. 43, 25 L. Ed. 822 (1879); BENJAMIN ON SALES, 4th ed., Sec. 60; BRANTLEY ON CONTRACTS,

3d ed. 169; POLLOCK ON CONTRACTS, 8th ed. In principle the same rule would apply where, as in the principal case, the offeree intends to contract with a definite person. Everyone has a right to select and determine with whom he will contract, and cannot have another person thrust upon him without his consent. Parties have the right to the benefit they anticipate from the character, credit, and substance of the party with whom they contract. *Everson v. Owens Mfg. Co.*, 145 Minn. 199, 176 N. W. 505 (1920); *Cundy v. Lindsay*, 6 Eng. Rul. Cases 211 (1878).

Expression of assent and not actual assent creates a contract. *Stephenson v. Glass*, 276 S. W. 1110 (Tex. Civ. App., 1925); *Wheeler v. Holloway*, 276 S. W. 653 (Tex. Comm. App., 1925); WILLISTON ON CONTRACTS, Sec. 95a. In consonance with this theory it is held that a party intends to contract with the person actually before him. *Western Union Telegraph Co. v. American State Bank*, 277 S. W. 226 (Tex. Comm. App., 1925). But in the instant case the parties never came into personal contact. A party is not bound by the interpretation which may be placed on ambiguous language unless he is blameworthy in permitting the ambiguity. WILLISTON ON CONTRACTS, Sec. 94. Such ambiguity may relate to persons. *Boulton v. Jones*, *supra*. And a failure to hear the words which an offerer spoke, if justifiable, will on every point of the case prevent the formation of a contract. *Rupley v. Daggett*, 74 Ill. 351 (1874). Confusion as to the identity of the opposite party to the negotiations often arises from the difficulty of correctly understanding names spoken over the telephone. What is the legal consequence of such conversation as in the instant case where plaintiff's name was not correctly understood? It is difficult to imagine how, in view of such an equipoise of probabilities, any reasonable business man could derive only one conclusion from the conversation, that a contract was thereby created between plaintiff and defendant. From a consideration of well settled principles it follows that the opinion of Stanford, J. (*dissenting*) to the effect that the mistake in the instant case prevented the formation of a contract and, therefore, would not have to be affirmatively pleaded as a ground for avoidance, is the correct view.

J. E. E.

CRIMINAL PROCEDURE—MOTION FOR NEW TRIAL FOR REFUSAL OF CONTINUANCE—JUDGE'S POWER TO PASS ON TRUTH OF AFFIDAVIT.—The state's evidence showed that the defendant called the twelve-year-old prosecutrix into her room and by means of intimidation forced her to submit to intercourse with defendant's husband. The defendant made an application for a continuance, introducing an affidavit of the absent witness to the effect that she was present at the time of the alleged rape, and that the prosecutrix was not raped. The continuance was refused, and the defendant was convicted of rape. The defendant moved for new trial, on the ground that the court erred in refusing the continuance. This motion was overruled, because the court did not believe the affidavit was true. *Held*, that when an application for continuance is denied and on motion for new trial an affidavit of the absent witness deposing to the facts stated in the application for continuance is attached, the court is not the judge of its probable truth. *Derrick v. State*, 272 S. W. 458 (Tex. Cr. App., 1925).

This decision follows a series of cases beginning with *Baines v. State*, 42 Tex. Cr. Rep. 510, 61 S. W. 119 (1901), holding that if the absent witness makes affidavit that he would have sworn to the facts stated in the application for continuance, and such affidavit be attached to the motion for new trial, the question of the probable truth of such testimony is no longer one for the decision of the trial court. *LeRoy v. State*, 43 Tex. Cr. Rep. 556, 67 S. W. 409 (1902); *Lawhorn v. State*, 46 Tex. Cr. Rep. 555, 81 S. W. 714

(1904); *White v. State*, 90 Tex. Cr. Rep. 584, 236 S. W. 745 (1922). It is said that if the court should pass on such affidavits it would be determining the credibility and weight to be given to the witness' testimony, which is a function of the jury, and would, also, be announcing in advance that the witness had committed perjury. *Sneed v. State*, 100 S. W. 922 (Tex. Cr. App., 1907); *Freeman v. State*, 75 S. W. 505 (Tex. Cr. App., 1903).

In 1879, a clause was embodied in the statute, providing that the truth of the first or any subsequent application (for a continuance) as well as the merit of the ground set forth therein and its sufficiency should be addressed to the sound discretion of the court called to pass upon the same and should not be granted as a matter of right; provided, that should an application for continuance be overruled, and the defendant convicted, if it appear upon the trial that the evidence of the witness or witnesses named in the application was of a material character, and that the facts set forth in said application were probably true, a new trial should be granted, and the cause continued or postponed to a future day of the same term. *PASCHAL'S DIGEST*, Art. 2987 (1879); *CODE CRIM. PRO.* 1911, Art. 608; *CODE CRIM. PRO.* 1925, Art. 543. Prior to the adoption of this clause, the courts consistently held that when the five requirements of the statute relating to application for continuance were complied with, no discretion existed in granting a continuance, that it should be granted as a matter of right. *Peeler v. State*, 2 Tex. Ct. App. 455 (1877); *Sansbury v. State*, 4 Tex. Ct. App. 99 (1878); *Stephenson v. State*, 5 Tex. Ct. App. 79 (1878). This rule was followed, even where a counter affidavit was produced in opposition to the motion to continue. *Farrar v. State*, 5 Tex. Ct. App. 489 (1879). After 1879, the court said that the intention of the legislature in enacting the clause referred to, was to change the law and avoid the interpretation given to it, *Aiken v. State*, 10 Tex. Ct. App. 610 (1881), and that even though the application for continuance were in conformity with the requirements of the statute, it could no longer be granted as a matter of right, but its truth and merits were addressed to the sound discretion of the trial court. *McAdams v. State*, 24 Tex. Ct. App. 86 (1887); *Hughes v. State*, 95 Tex. Cr. Rep. 65, 252 S. W. 774 (1923). In *Page v. State*, 94 Tex. Cr. Rep. 486, 251 S. W. 806 (1923) the court recognizes the above rule, where an affidavit of the absent witness is not produced, but in its dictum, states that if the absent witness had made affidavit that he would have sworn to the facts stated in the application, and same be attached to the motion for new trial, the question of the probable truth of such testimony would no longer be one for the determination of the trial court. The court has even gone so far as to apply this rule where a counter affidavit was offered contesting the affidavit supporting the motion for new trial. *Keith v. State*, 96 Tex. Cr. Rep. 168, 256 S. W. 926 (1923).

Thus it is seen that the courts exercise the discretionary power granted to them by the statute, except where the affidavit of the absent witness is produced. In the latter situation the court accepts the affidavit as true. The criticism that the courts have assumed legislative power by reading an exception into the statute, not justified by its language or intent, seems sound. *Baines v. State*, 42 Tex. Cr. Rep. 510, 514 (1901) (dissenting opinion of Brooks, J.). The objection that the functions of the jury would be usurped, if the court determined the truth of the witness' affidavit, has never been thought of, where there was an application for continuance, containing the facts expected to be proved by the absent witness, but not supported by the witness' affidavit, or where there was a motion for new trial on the ground of newly discovered evidence, *Burns v. State*, 12 Tex. Ct. App. 269 (1882), and yet, in both cases, the court weighs and determines the truth of the expected testimony of the absent witness. Therefore, if the general rule,



announced by the statute is sound, there certainly is no basis for the exception, for the same objection that is offered against the exception applies with equal force to the general rule. The contention that the statute is unconstitutional, because the defendant's right of a trial by jury is denied when the court exercises its discretion in passing on the probable truth of the absent witness' testimony, seems unfounded, *Lillard v. State*, 17 Texas Ct. App. 114 (1884), for the decision of issues of fact arising on the hearing of motions for continuance or for new trial has never been part of the functions of the jury. Furthermore, as a matter of policy, the judge who has been present at the trial and heard the evidence is certainly in as good a position to determine the truth of the absent witness' testimony as is the jury.

J. W. M., Jr.

**DIVORCE—ACTION BROUGHT BY INSANE SPOUSE.**—To a suit for divorce by wife through next friend, defendant pleaded in abatement that his wife was insane. From a judgment sustaining this plea and dismissing the suit the plaintiff appealed. *Heid*, that an insane wife cannot maintain an action for divorce either in her own name or by next friend. *Dillion v. Dillion*, 274 S. W. 217 (Tex. Civ. App., 1925).

Article 4631, VERNON'S SAYLES' CIV. STATS., 1922 Supp., states the grounds upon which a divorce may be granted. Article 4632 prescribes the requirements for bringing a divorce suit and names an additional cause for divorce, viz., where the parties have lived apart without cohabitation for ten years. The statute further provides that "this act shall not apply to any case where either the husband or wife is insane." Construing this statute to prohibit divorce in all cases where either of the parties was insane the court in the case of *Skeen v. Skeen*, 190 S. W. 1118 (Tex. Civ. App., 1916) denied a divorce to an insane plaintiff, and in the case of *Daugherty v. Daugherty*, 198 S. W. 985 (Tex. Civ. App., 1917), took the same position where the defendant was insane. But in the case of *Wilemon v. Wilemon*, 112 Tex. 586, 250 S. W. 1010 (Comm. of App., 1923), it was held that Article 4632 denied divorce when either of the parties was insane only when the grounds on which it was sought was that there had been a living apart without cohabitation for ten years. Following this the court in *Jordan v. Jordan*, 257 S. W. 569 (Tex. Civ. App., 1923) held that the *Wilemon Case* overruled the *Daugherty Case* and granted a divorce against an insane defendant. In all the above cases except one the insane party was the defendant. The court in the principal case adopted the common law doctrine that an insane person cannot sue for divorce either in his own name or by next friend. *Mohler v. Shank*, 93 Iowa 273, 61 N. W. 981, 57 Am. St. Rep. 274, 34 L. R. A. 161 (1895); *Worthy v. Worthy*, 36 Ga. 45, 91 Am. Dec. 758 (1867; Note 34, L. R. A. 166. The reason given is that divorce, like marriage, is purely a personal matter and the courts will not allow a dissolution of the marital bonds without the personal consent of the one seeking it and since consent is impossible while such spouse is insane, the action is therefore denied. 2 BISHOP, MARRIAGE, DIVORCE, AND SEPARATION, Sec. 525; LONG ON DOMESTIC RELATIONS, 2nd Ed., Sec. 213. However, there are some obvious objections to such an arbitrary rule and several of the states have provided by statute that, where sufficient cause exists, action for divorce may be brought for an insane person by guardian. *Cowan v. Cowan*, 139 Mass. 377, 1 N. E. 152 (1885); *Thayer v. Thayer*, 9 R. I. 377 (1869).

In the 1925 revision of the statutes Article 4629 replaces Articles 4631 and 4632, VERNON'S SAYLES' CIV. STATS., 1922 Supp. This article begins as follows: "Except where the husband or wife is insane a divorce may be de-



creed in the following cases. . . ." It would seem that the plain intention of the legislature was to make divorce impossible where either of the parties is insane. Under this statute divorce could not be granted against an insane spouse even when the grounds for divorce arose before the insanity. While the weight of authority does not allow a divorce in a case where it is sought merely on the grounds of insanity, *Lloyd v. Lloyd*, 66 Ill. 87 (1872), or for acts committed while insane, 4 VA. LAW REGISTER (N. S.) 248, relief is granted where the acts were committed by the spouse before the insanity arose. *Huston v. Huston's Committee*, 150 Ky. 353, 150 S. W. 386 (1912); *Stratford v. Stratford*, 92 N. C. 297 (1885). 2 SCHOULER, MARRIAGE, DIVORCE, SEPARATION, AND DOMESTIC RELATIONS (6th ed.), Sec. 1679. There are cases where the statute might work an injustice and the situation is one that would seem to warrant legislative relief.

J. N. J.

ELECTIONS—CONSTRUCTION OF ELECTION STATUTES—INDORSEMENT OF BALLOTS.—The contestant sought to invalidate election ballots on the theory that there had been no compliance with Articles 3001 and 3011, REV. CIV. STATS. 1911 (Arts. 3008 and 3018, REV. CIV. STATS. 1925), which require that the presiding judge at each election box write his *signature* on each ballot; and that the counting clerks familiarize themselves with his signature, and shall count no ballots not bearing it. The presiding judge had indorsed only his *initials* on the ballots. *Held*, that this was a sufficient compliance with the requirement that he write his "signature." *Turner v. Teller*, 276 S. W. 115 (Tex. Civ. App., 1925).

This case affirms the proposition that the provisions of these and similar statutes are mandatory—must be complied with. *Arnold v. Anderson*, 41 Tex. Civ. App. 508, 93 S. W. 692 (1906); *Brigance v. Horlock*, 44 Tex. Civ. App. 277, 97 S. W. 1060 (1906); *State v. Connor*, 86 Tex. 133, 23 S. W. 1103 (1893); *State v. Gray*, 92 Tex. 396, 49 S. W. 217 (1899); *Griffin v. Tucker*, 51 Tex. Civ. App. 522, 119 S. W. 338 (1908); and *Shipman v. Jones*, 199 S. W. 329 (Tex. Civ. App., 1917). But it differs from those decisions by placing a liberal construction on the sufficiency of that compliance. *Perkins v. Bertrand*, 192 Ill. 58, 61 N. E. 405, 85 Am. St. Rep. 315 (1901); *Slenker v. Engel*, 250 Ill. 499, 95 N. E. 618 (1911). The court reasoned that the requirements in this case were mandatory because they were negative in form, i. e., they forbade the counting of ballots not so signed, *State v. Connor*, *supra*; *Bladen v. Philadelphia*, 60 Pa. St. 464 (1869); but it upheld the initialing as being within the purview of the word "signature," in order to effectuate the will of the voters, which is really the purpose of all election regulations. *Fowler v. State*, 68 Tex. 30 (1887); *Johnston v. Peters*, 260 S. W. 911 (Tex. Civ. App., 1924). The object of the statutes under consideration is to prevent the casting of spurious ballots; and the fact that in the majority of states only the initials of the judge or clerk are required as an indorsement, is ample proof that they accomplish that result. *Muskoka Provincial Election*, 4 Ont. L. Rep. 253, 1 Ont. W. R. 487 (1902).

In holding that provisions of election statutes of this nature are mandatory, the principal case lines up with the majority of the states. *Grubb v. Turner*, 259 Ill. 436, 102 N. E. 810 (1913); *People v. Onondaga Board of Canvassers*, 129 N. Y. 395, 29 N. E. 327, 14 L. R. A. 624 (1891); 20 C. J. 151, citing other cases. And there are a few expressions to the effect that such statutes are to be strictly construed. *Blue v. Allee*, 184 Ind. 302, 111 N. E. 185 (1916); *People v. Rhinehart*, 161 Mich. 585, 126 S. W. 704 (1910).

A few courts hold that such statutes, even though stated in negative form, in express words of prohibition, are merely directory, and that only a showing of fraud will invalidate irregular ballots. *Ex parte Anderson*, 102 S. W. 727

(Tex. Crim. App., 1907); *Hehl v. Guion*, 155 Mo. 76, 55 S. W. 1024 (1900); *O'Connell v. Mathews*, 177 Mass. 518, 59 N. E. 195 (1901); *Truelson v. Hugo*, 67 Minn. 139, 91 N. W. 434 (1902).

In ordinary parlance, and to the majority of courts, the word "signature" has come to connote the full name—or at least the surname preceded by the initials of the given names—of a person, in that person's own handwriting. *Wade v. State*, 22 Tex. Cr. App. 256, 2 S. W. 594 (1886). This restricted meaning is not to be gathered from the word itself. Vol. 7, WORDS AND PHRASES, page 6508; WEBSTER'S NEW INTERNATIONAL DICTIONARY. The construction placed upon the word in the principal case has the support of *Hammons v. State*, 59 Ala. 164 (1877); *Smith v. Howell*, 11 N. J. Eq. 349 (1857); *Sanborn v. Flagler*, 9 Allen (Mass.) 474 (1884), which, however, were not election cases; and of *Perkins v. Bertrand*, *supra*, in which ballots were held sufficient where the initials were required but the full name was used, and *Muskoka Provincial Election*, *supra*, where initials were required but less than all of the initials were used.

#### D. C. B.

EQUITY—DUTY OF PERSON HOLDING CLOUD ON ANOTHER'S TITLE TO EXECUTE RELEASE.—W was the assignee of a recorded oil and gas lease for five years, G being the lessor. The lease was forfeited after two years by the breach of a condition therein, which provided that the lease should be terminated on a certain date if lessee had not begun drilling for oil, or paid a certain rent by such date. Later, G, desiring to convey the land and needing a clear title of record, entered into an agreement with W whereby he offered to pay W \$500 for a release of the void, but recorded, lease. W made the release but G refused to pay the \$500, whereupon W brought suit for that amount. *Held*, that W, having a recorded but void instrument affecting G's land, owed G the duty to release such apparent interest, and that any promise, having such action as consideration, was void for lack of consideration. *Witherspoon v. Green*, 274 S. W. 170. (Tex. Civ. App., 1925.)

Justice Holmes has defined a legal duty as "nothing but a prediction that if a man does or omits certain things he will be made to suffer in this or that way by the judgment of the court." 8 HARV. L. REV. 458. Apparently, then, one who holds a cloud on another's title is under a duty to release such claim; for the court will give a decree ordering that he execute a release of the apparent claim, *Hart v. Sansom*, 110 U. S. 151, 28 L. Ed. 101 (1883), or, under the modern statutory practice, a decree operating of itself as an extinguishment of the claim, TEX. REV. CIV. STAT. 1925, Art. 2214; and such decrees ordinarily carry costs against the defendant. While the filing of a disclaimer of title by the defendant is said to be a defense, *Howard v. Davis*, 6 Tex. 174 (1851), it seems rather to be a compliance with the duty to release, *Prescott v. Hutchinson*, 13 Mass. 439 (1816), and under the practice obtaining in some states it does not prevent a decree for the plaintiff, *Perkins v. Morse*, 30 Minn. 11, 13 N. W. 911 (1882); *Osburn v. Hinds County*, 71 Miss. 19, 14 So. 457 (1894). It usually prevents a recovery of costs against the defendant, *Deacon v. Central Iowa Inv. Co.*, 95 Iowa 180, 63 N. W. 673 (1895); *Howard v. Davis*, *supra*; but a defendant has been held liable for costs, even though he had disclaimed, because he had denied and refused to perform his duty before the suit was begun. *Beck Lbr. Co. v. Rupp*, 188 Ill. 562, 59 N. E. 429, 80 Am. St. 190 (1900). Hence the fact that a defendant in a suit to remove cloud can disclaim and avoid costs does not constitute a denial or evasion of the duty to release such cloud, but is in reality an acknowledgment of such duty. That the basis of suits to remove cloud is the duty of the holder of such cloud to release same is expressly decided in *Engelbach v. Simpson*, 12 Tex. Civ. App. 188, 33 S. W. 596 (1896), wherein

the court ruled that the holder of an express vendor's lien was under the duty to release such claim when the last note thereunder was paid: basing this decision on the duty of the holder of a cloud on another's title to remove such.

Since the holder of a cloud on another's title is under a duty to release such, and, since an oil and gas lease, forfeited according to its terms, *Brewster v. Zinc Co.*, 72 C. C. A. 213, 140 Fed. 801 (1905), is a cloud, W, in the present case, owed G the duty of executing a release of such cloud; being under such a duty his giving of the release was no consideration for G's promise, which is not binding on G. *Jones v. Risley*, 91 Tex. 1, 32 S. W. 1027 (1895); *Chilson v. Bank*, 9 N. D. 96, 81 N. W. 33 (1899); WILLISTON ON CONTRACTS, Sec. 132.

R. L. H.

EVIDENCE—WITNESSES—VIEW.—In a habeas corpus proceeding, tried before a judge without a jury, to determine the custody of a child in which the question of parentage was involved, the trial judge read into the record the results of his personal examination of birthmarks on the child without being sworn or examined as a witness. *Held*, error. That though the trial judge may be a witness in a cause being tried before him he must conform to the rules of procedure applicable to other witnesses. *Conyer et al. v. Burckhalter et al.*, 275 S. W. 606 (Tex. Civ. App., 1925).

With the statement that "it is not now an open question," the court dismisses any doubt as to the competency of a judge to testify in the cause over which he presides. Such is the rule by statute in criminal cases. Art. 717 P. C.; *Valentine v. State*, 6 Tex. App. 439 (1879). In absence of statute the contrary view seems to be general. *Gray v. Crockett*, 35 Kan. 66, 10 Pac. 452 (1886); *Baker v. Thompson*, 89 Ga. 486, 15 S. E. 644 (1892); *State v. De Maio*, 69 N. J. Law 590, 55 Atl. 644 (1903); *Terrell v. U. S.*, 6 Fed. (2d) 498 (1925). And of course a statute making the judge competent in civil cases would not apply in criminal cases. *Rogers v. State*, 60 Ark. 76, 29 S. W. 894 (1894). The principal objections brought out by these courts seem to be: (1) It is not consonant with our idea of fairness for a judge to pass on the weight of his own testimony on a motion for a non-suit. (2) That counsel would be embarrassed in cross examining the judge. (3) That the judge's testimony would have an undue weight with the jury. It would seem that these objections have force only in those rare cases where the judge is a witness as to a substantial, contradicted issue. WIGMORE ON EVIDENCE, Vol. 4, Sec. 1909.

It is clear that all witnesses should be sworn. Art. 1, Sec. 5, CONST. OF TEX.; *Cable v. Key*, 256 S. W., 654 (Tex. Civ. App., 1923). But was the judge in the principal case a witness? Could he be said to have judicial notice of the birthmarks on the child? This could hardly be contended since such information is neither notorious nor incontrovertible.

There is one other theory on which the trial judge may have predicated his action. Since the case was tried without a jury could not the judge, acting as the trier of the facts and law, take a "view"? In criminal cases a "view" by the jury is not permitted. *Smith v. The State*, 42 Tex. 444 (1875); *Lovett v. The State*, 87 Texas Cr. Rep. 548 (1920). But in civil cases the courts intimate that a "view" may be allowed in the discretion of the judge, but that it should be under his direction and in the presence of the parties or counsel. *G. C. & S. F. Ry. v. Hamilton*, 17 Tex. Civ. App. 76, 42 S. W. 358 (1897); *Hovey v. Sanders*, 174 S. W. 1025 (Tex. Civ. App., 1915). The same privilege should be allowed the court if the judge is the tribunal of fact. WIGMORE ON EVIDENCE, Vol. 2, Sec. 1169. But he should



not take a private "view," as was done in the instant case. *Elston v. McGlaughlin*, 79 Wash. 355, 140 Pac. 396 (1914).

R. G. H.

FRAUD—RESCISSION—EFFECT OF NO WARRANTY CLAUSE IN CONTRACT.—Plaintiff corporation entered into an agreement with the defendant commissioners to complete a sewage tunnel. In making its bid, plaintiff relied on blue prints, furnished by defendants, which purported to show the character of earth formation to be encountered, but the contract expressly provided that the defendants did not warrant the plot of the tunnel to be approximately correct and that the plaintiff should have no claim in case it was not approximately correct. Plaintiff, on finding materials which were different from those indicated, attempted to rescind and brought this suit on a *quantum meruit* to recover the value of services rendered. *Held*, that, inasmuch as other contractors had given up the work because of different formations and their reason for so doing was known to the defendants, the agreement was at least technically fraudulent and the plaintiff could maintain this action. *Passaic Valley Sewerage Com'rs. v. Holbrook, Cabot & Rollins Corporation*, 6 Fed. (2d) 721 (C. C. A., 1925).

The findings of the jury would seem to show that the acts of defendant constituted actionable fraud. Even if defendant's statements were honest, their materiality and falsity might justify rescission. The principal question in the case is as to the effect to be given to the clause by which the plaintiff assumes risk of error. It has been uniformly held that the defendant cannot rely on such a clause to prevent liability for deceit when the action is based on deliberate misstatements. *Normile v. Denison*, 109 Wash. 205, 186 P. 305 (1919); *Pearson v. Dublin*, (1907) App. Cas. 351; 27 C. J. 22. The same result has been reached in cases of rescission. *Bridger v. Goldsmith*, 143 N. Y. 424, 38 N. E. 458 (1894). The courts hold that the plaintiff has a right to rely on the representations to the extent of believing that the defendant was honest in making them and will not permit the defendant to use such a provision as a cloak for a fraudulent design. Stress may be laid on the lack of time which prevents the plaintiff from investigating the character of the work. *Christie v. U. S.*, 237 U. S. 234, 59 L. Ed. 933, 35 Sup. Ct. 565 (1915). But the same decision is reached when he had sufficient time. *Hollerbach & May v. U. S.*, 233 U. S. 165, 58 L. Ed. 898, 34 Sup. Ct. 553 (1914); *Jackson v. State*, 210 App. Div. 115, 205 N. Y. S. 658 (1924). In one case in which the plaintiff discontinued the work he was allowed to recover the difference between the cost of the work done and the amount received on the contract. *U. S. v. Atlantic Dredging Co.*, 253 U. S. 1, 64 L. Ed. 735, 40 Sup. Ct. 423 (1920). In another he recovered the profits which he would have made on the contract. *U. S. v. Spearin*, 248 U. S. 132, 63 L. Ed. 166, 39 Sup. Ct. 59 (1918). It has been held that a plaintiff by proving a misstatement may not, in the absence of fraud, maintain an action on a contract which contains a "no warranty" clause. *Kelly v. City of N. Y.*, 87 App. Div. 299, 84 N. Y. S. 349 (1903), affirmed (memorandum decision), 180 N. Y. 507, 72 N. E. 1144 (1904); *Pearson & Son, Inc., v. State*, 112 Misc. Rep. 29, 182 N. Y. S. 481 (1920). This has been justified on the theory that the risk for such a mistake was expressly assumed by the plaintiff. Whether the same result would be reached in Texas is arguable, in view of the doctrine that a false, material misrepresentation justifies rescission. *Buchanan v. Burnett*, 102 Tex. 492, 119 S. W. 1141 (1909).

A situation similar to that in the principal case has arisen in another recent Federal case, but there the plaintiff completed the work and then



sued to recover damages for the breach of an implied warranty arising from false representations. The court construed the "no-guarantee" clause as not being applicable to wilful misrepresentation and permitted plaintiff to recover. *City of Lima v. Farley*, 7 Fed. (2d) 40 (C. C. A., 1925).

H. G.

**FRAUDULENT CONVEYANCES—BULK SALES ACT—EFFECT OF OMISSION OF CREDITORS FROM LIST.**—Robinowitz bought from McFarland, as owner of a place of business, the fixtures thereof, taking possession of them that day; contemporaneously with the purchase, Robinowitz in good faith received an affidavit from McFarland purporting to be a true statement of the names, etc., of all his creditors. Robinowitz immediately notified all those named, and then, after waiting more than ten days, paid them all in full their claims. Subsequently it developed that appellant had been left out of the sworn list, and that McFarland owed him \$215 for equipment. In this action appellant sought to recover this amount of appellee, under allegations that in buying the fixtures he had failed to comply with the requirements of the Bulk Sales Act. *Held*, that appellee was not liable to creditors of seller omitted by seller from sworn list, appellee being entitled under the act to take seller's sworn statement at its face value. Also that notice before paying for property would be sufficient, irrespective of when possession might be taken. *Brecht Co. v. Robinowitz*, 275 S. W. 213 (Tex. Civ. App., 1925). (Writ of error refused, Nov. 11, 1925.)

The holding of the principal case is unquestionably sound, the mere fact that possession was taken before the expiration of ten days being immaterial.

The Bulk Sales Act as originally passed in 1909 (Art. 3971, TEX. REV. CIV. STAT., 1911) was held constitutional as an exercise of the police power in *Nash Hardware Co. v. Morris*, 105 Tex. 217, 146 S. W. 874 (1912). The act was amended in 1915, 34 LEG. PRO. 171, the practical effect of which was to make the non-complying purchaser a receiver for the benefit of creditors and to make him personally liable where he has disposed of the goods. *Hay et al. v. Behrens Drug Co.*, 214 S. W. 940 (Tex. Civ. App., 1919). (Overruling on this latter point *Bewley v. Sims*, 145 S. W. 1076 (Tex. Civ. App., 1912), decided prior to the amendment).

Mortgaging a stock of goods in bulk has been held to be a "transfer," if not a "sale," and is prohibited by the statute. *Beene v. National Liquor Co.*, 198 S. W., 596 (Tex. Civ. App., 1917). Conveyances not made in absolute conformity with the statute are not absolute nullities, but void only when attacked by a creditor whose rights have been ignored. *Hall v. Connie*, 230 S. W. 823 (Tex. Civ. App., 1921). The creditor's remedy ordinarily is garnishment. *Kell Milling Co. v. H. O. Wooten Grocery Co.*, 195 S. W. 342 (Tex. Civ. App., 1917).

It has been held that a non-complying purchaser who, as consideration for the transfer, releases the sellers' debt to him, cannot receive it so as to share with the sellers' creditors, the contract being unlawful. *Mayfield Co. et al. v. Harlan & Harlan*, 184 S. W. 313 (Tex. Civ. App., 1916). A similar holding in Minnesota, denying subrogation to a non-complying purchaser who as part of the consideration for the transfer discharged a debt owing by the vendor, was justly criticized in 5 MINN. L. REV. 479. The purchase being made without intentional fraud, the debt should be revived.

B. M. B., Jr.

**GUARDIAN AND WARD—APPLICATION FOR APPOINTMENT—REMOVAL OF NATURAL GUARDIAN.**—Plaintiff made application to the county court to be appointed temporary guardian of a minor, alleging that the mother was dead,

and the father wholly unfit and incompetent. The application was granted in the county court, but was revoked in the district court and the case dismissed for lack of jurisdiction, on the grounds that the father was in law the natural guardian of his child, and no order was made removing him, prior to the order appointing the temporary guardian. *Held*, the granting of an application for guardianship, after notification to or voluntary appearance of the natural guardian, is in itself a removal of the natural guardian and a formal removal order is unnecessary. *McGeorge v. Thomason*, 275 S. W. 683 (Tex. Civ. App., 1925). (Writ of error granted, Dec. 2, 1925.)

The case presents a novel point in this state. The Texas statute declares "Only one person can be appointed guardian of the person or estate. . . ." REV. CIV. STAT., 1925, Art. 4124. By virtue of that statute it has been held that where a guardian has been *appointed*, and has not been removed, there can be no valid appointment of another. *Sanitarium v. Crim*, 38 Tex. Civ. App. 1, 84 S. W. 1114 (1905). The law is similar in other jurisdictions. *Dupree v. Perry*, 18 Ala. 34 (1850); *Dickerson v. Bowen*, 128 Ga. 122, 57 S. E. 326 (1907); *White v. Pomeroy*, 7 Barb. 640 (1849); *In re Dahnke's Estate*, 64 Cal. App. 555, 222 Pac. 381 (1923). No action of a court is necessary to constitute a surviving parent guardian of a minor child. *Harris v. Petty*, 66 Tex. 517, 1 S. W. 525 (1886); *Legate v. Legate*, 87 Tex. 253, 28 S. W. 281 (1894). Nevertheless, it is submitted, that in the absence of statutory provision with respect to *natural* guardians, to require the removal of a guardian who is fully aware of the application by being made a party to the suit, would be a needless and technical formality. Apparently, under the English decisions, that procedure is not necessary. *Whitfield v. Hales*, 12 Ves. Jun. 492, 33 Eng. Rep. 186 (1806). The liberal construction in the principal case is to be commended.

I. M. W.

JOINT ADVENTURES.—Plaintiff and the two defendants joined together in the promotion of a corporation which, when chartered, issued to one of the defendants, in trust for the three promoters, 450 shares of its stock in payment for their services. Plaintiff claimed one-third of said stock on the grounds that this was the agreement of the parties or was the reasonable value of his services, but the defendants denied any express agreement with the plaintiff or that he was a partner with them, and offered him fifty shares, which he refused. The jury awarded 150 shares to the plaintiff. *Held*, that the parties were engaged in a joint adventure and consequently plaintiff was entitled to an equal division of the profits, irrespective of equality in payment or service. *Finney v. Terrell*, 276 S. W. 340 (Tex. Civ. App., 1925).

The instant case is believed to be the first case expressly recognizing the existence of joint adventures in Texas. A joint adventure, as a legal concept, is of comparatively modern origin. The courts generally make the distinction that whereas a joint adventure usually relates to a single transaction, though it may comprehend a business to be continued for a period of years, a partnership relates to the conduct of a general business. *Saunders v. McDonough*, 191 Ala. 119, 67 So. 591 (1914); *Reece v. Rhoades*, 25 Wyo. 91, 165 Pac. 449 (1917); *Jackson v. Hooper*, 76 N. J. Eq. 185, 74 Atl. 130 (1909). Some courts make the distinction that in a joint adventure one adventurer may sue the others at law for a breach of the contract, a share of the profits, or a contribution for the advances made in excess of his share, *Reece v. Rhoades*, *supra*; *Keyes v. Nims*, 184 Pac. 695 (Cal. App., 1919), whereas a partner cannot sue his copartner at law upon matters involving partnership transactions, but must look to equity for relief by a

suit for an accounting. *Dukes v. Kellogg*, 127 Cal. 563, 60 Pac. 44 (1900); 2 ROWLEY, MODERN LAW OF PARTNERSHIP, Sec. 743. The general rule as to partnerships, however, has been held not to apply and an action at law is allowed, where the partnership is for a single transaction, and no accounting is necessary. *Kutz v. Dreibelbis*, 126 Pa. 335, 17 Atl. 609 (1889); BURDICK, PARTNERSHIP, 3d Ed., pp. 330-332; 2 ROWLEY, MODERN LAW OF PARTNERSHIP, p. 1038. Thus any distinction based on the nature of remedies between parties seems unjustifiably drawn.

The prevalent view seems to be that a joint adventure and a partnership are governed by the same rules. *Ross v. Willett*, 76 Hun. 211, 58 N. Y. St. Rep. 694, 27 N. Y. Supp. 785 (1894); *Hubbell v. Buhler*, 43 Hun. 82, 6 N. Y. St. Rep. 578 (1887). In the absence of any agreement in the contract of joint adventure as to the division of profits and losses, the legal presumption is that they are to be shared equally. *Saunders v. McDonough*, *supra*; *Hoge v. George*, 27 Wyo. 423, 200 Pac. 96 (1921); *Knudson v. George*, 157 Wis. 520, 147 N. W. 1003 (1914). The joint adventurers are jointly and severally liable for personal injuries suffered by others from the negligence of themselves, their agents, and employes, acting within the scope of their employment. *Bonfils v. Hayes*, 70 Colo. 336, 201 Pac. 677 (1921); *Stroher v. Elting*, 97 N. Y. 102, 49 Am. Rep. 515 (1884). A court of equity will not dissolve a joint adventure for any other cause than those which justify the dissolution of partnerships. *Hubbell v. Buhler*, *supra*; *Saunders v. McDonough*, *supra*; *Jackson v. Hooper*, *supra*. As a general rule, in jurisdictions where the uniform partnership act has not been adopted, a corporation is incapable of becoming a partner, *Sabine Tram Co. v. Bancroft*, 16 Tex. Civ. App. 170, 40 S. W. 837 (1897); 1 ROWLEY, MODERN LAW OF PARTNERSHIP, p. 197, but it may bind itself for a joint adventure, the purpose of which is within the scope of the corporate business. *Mestier v. Chevalier Paving Co.*, 108 La. 562, 32 So. 520 (1901); *Keyes v. Nims*, *supra*.

In Texas, a partnership can exist for a single transaction. *Spencer v. Jones*, 92 Tex. 516, 50 S. W. 118 (1899); *Rush v. Bank*, 160 S. W. 319 (Tex. Civ. App., 1913). So it is difficult to see what advantage is to be derived from the recognition of a joint adventure. The term "joint adventure" is to be found in few Texas cases, and the courts in these cases say "joint adventure or partnership," apparently intending to use the terms interchangeably. *Indianoma Refining Co. v. Wood*, 255 S. W. 212 (Tex. Civ. App., 1923); *Rush v. Bank*, 160 S. W. 319 (Tex. Civ. App., 1913), 210 S. W. 521 (Tex. Comm. App., 1919). In the instant case, the plaintiff's services were performed under either an express or implied contract, and plaintiff sought to recover either on contract or *quantum meruit*. However, the court did not determine the case on either of these grounds, but treated the promotion stock as profits of a joint adventure and held that plaintiff was, in the absence of an express agreement, by presumption of law entitled to one-third thereof. It would seem that this case could have been decided simply by the application of ordinary contract law rather than by resort to the application of legal rules created by law governing a special relationship. Indeed, it seems that this might be true of all cases which have been decided upon the basis of the relationship of joint adventures.

A few of the earlier cases held that promoters of a corporation were partners, *Holmes v. Higgins*, 1 B. & C. 74 (1822); *Lucas v. Beach*, 1 Man. & G. 417 (1840), but these cases have not been followed and do not represent the modern view. Promoters are not engaged in carrying on a business, a necessary element of partnership, but in preliminary negotiations for the launching of a business. *Arnold v. Conklin*, 96 Ill. App. 373 (1901) (*reversed on other ground*), 199 Ill. 201, 65 N. E. 224 (1902); *Breitzke v. Tucker*, 129 Ark. 401, 196 S. W. 462 (1917); BURDICK, PARTNERSHIP,



p. 36. Inasmuch as partnerships and joint adventures are, by the weight of authority, governed by the same rules, the view of the principal case that the promoters of a corporation are joint adventurers would seem to result, as a practical proposition, in a return to the old view.

B. L. B.

**JUDGMENTS—JUDGMENT NOT NAMING ALL DEFENDANTS—PRESUMPTIONS ON COLLATERAL ATTACK.**—A sued P<sub>1</sub>, P<sub>2</sub>, P<sub>3</sub>, D and Z on a promissory note and obtained a judgment against P<sub>1</sub>, P<sub>2</sub>, P<sub>3</sub> and D, no order or judgment being made disposing of Z. P<sub>1</sub>, P<sub>2</sub> and P<sub>3</sub> paid off the judgment and now sue D for contribution of his one-fourth part. *Held*, the judgment was not a valid final judgment or a valid subsisting claim against any of the defendants, and it was error to consider defendant's challenge of the validity of this judgment a collateral attack on a judgment of a court of competent jurisdiction. *Gathings v. Robertson*, 276 S. W. 218 (Tex. Comm. App., 1925).

Judgments which fail to dispose of all the issues presented by cross action were formerly held by some of the Courts of Civil Appeals not to be final, upon a strict construction of what is now Article 2211, REV. CIV. STAT., 1925, which provides that "the judgment of the court shall conform to the pleadings, the nature of the case proved and the verdict, if any. . . ." *Lewis v. Kelley*, 146 S. W. 1197 (Tex. Civ. App., 1912); *Railway Co. v. Stephenson*, 26 S. W. 236 (Tex. Civ. App., 1894). See also *Mignon v. Brinson*, 74 Tex. 18 (1889). Taking a more liberal view of this statute, others of the Courts of Civil Appeals held that a general judgment in favor of plaintiff against defendant adjudicated all matters pleaded in the cross action as effectually as though the judgment embodied an express finding thereon. *Bemus v. Donigan*, 18 Tex. Civ. App. 125, 43 S. W. 1052 (1898); *Crain v. Insurance Co.*, 56 Tex. Civ. App. 406, 120 S. W. 1098 (1909). This more liberal view, which holds the unmentioned issues to be disposed of by necessary implication, was adopted by the Supreme Court in the leading case of *Trammell v. Rosen*, 106 Tex. 132, 157 S. W. 1161 (1913).

Judgments which fail to dispose of all the defendants to the suit were early held not final, on the theory that since the statutes (Art. 2211, REV. CIV. STAT., 1925; see Arts. 1997, 1937, REV. CIV. STAT., 1911) provide that since only one final judgment may be rendered in any cause, so long as any defendant remains undisposed of, final judgment has not been rendered. This holding has been carried to the extreme of declaring that such a judgment will not support an action against the parties who are named in it. *Hulme v. Janes, Adm'r*, 6 Tex. 242 (1851); *Rhone v. Ellis*, 30 Tex. 31 (1867); *Whitaker v. Gee*, 61 Tex. 217 (1884); *Ledyard v. Brown*, 39 Tex. 402 (1873); *Merchants Produce Co. v. Culpepper*, 247 S. W. 651 (Tex. Civ. App., 1923).

But the authority of this line of decisions may be seriously questioned, in view of *Burton v. Varnell*, 5 Tex. 139 (1849), *Houston v. Ward*, 8 Tex. 124 (1852), *Gullett v. O'Connor*, 54 Tex. 408 (1881), *Alston v. Emmerson*, 83 Tex. 231, 18 S. W. 566, 29 Am. St. Rep. 639 (1892), *Wilson v. Smith*, 17 Tex. Civ. App. 188, 43 S. W. 1086 (1897), *Smith v. Wilson*, 18 T. C. A. 26, 44 S. W. 556 (1898), and the very recent case of *Lindsey v. Hart*, 276 S. W. 199 (Tex. Comm. App., 1925), in all of which cases the judgments were liberally construed so as to read into them their necessary implications and make them serviceable instead of useless, as was stated to be the true rule in the last case cited. These cases seem to be thoroughly in accord with the parallel holding of *Rackley v. Fowlkes*, 89 Tex. 613, 36 S. W. 77 (1896), which was approved in *Trammell v. Rosen*, *supra*, that where the pleadings put in issue plaintiff's right to recover upon two causes of action, and the judgment awards him a recovery upon one, but is silent as to the other, such judgment is *prima facie* an adjudication that he is



not entitled to recover upon such other cause. There should be no difference in principle between disposing of a party by implication and disposing of an issue in that manner.

The statute providing that only one final judgment may be rendered in any cause was not originally passed as an independent enactment covering the whole field of judgments, but was part of a provision that default judgment may be rendered against those who do not answer, and the trial proceeded with against the others. Acts 1846, p. 363, Sec. 47; PASCHAL'S DIGEST, Vol. 1, p. 357; GAMMEL'S LAWS, Vol. 2, p. 1681. Its interpretation holding a judgment void which fails to dispose of all of the issues or all of the parties seems to have been an unjustifiable extension beyond its original purpose. *Burton v. Varnell*, 5 Tex. 139 (1849).

In the principal case Z, who was left out of the judgment, was receiver for a company which had executed a note on which the four other defendants, P<sub>1</sub>, P<sub>2</sub>, P<sub>3</sub>, and D, were sureties. This note was renewed by a second note, the note in suit, which was executed by the four other defendants as principals, without the signature of Z or his company. This showing that there was no cause of action against Z should be sufficient grounds for the appellate court to imply that the judgment of the trial court was intended to dispose of Z along with the other defendants. *Lindsey v. Hart*, 276 S. W. 199 (Tex. Comm. App., 1925). It seems difficult to harmonize the decision of the principal case with the trend of recent authority or with a correct view of the statute on which it is based, or to support it as reaching a just result of the controversy.

The holding in the principal case that it was error to consider this contest a collateral attack on a judgment of a court of competent jurisdiction and allow in its favor the ordinary presumption on collateral attack in favor of the truth of the recitations of a judgment is also subject to question. (For a statement of this presumption see *Crawford v. McDonald*, 88 Tex. 626 (1895), and *Dunn v. Taylor*, 42 Tex. Civ. App. 241, 94 S. W. 347 (1906).) The court below was a competent court, it had obtained jurisdiction of the subject matter and of the parties, and it rendered a judgment which it had power to render, and which showed no defects on its face. A judgment is not void except for want of a legally organized court, want of jurisdiction over the subject matter or parties, or want of power to render the particular judgment or decree. *Crow v. Van Ness*, 232 S. W. 539 (Tex. Civ. App., 1921); *Dowdle v. U. S. Fidelity Guaranty Co.*, 242 S. W. 771 (Tex. Civ. App., 1922); note, 32 Am. Dec. 604; FREEMAN, Sec. 325. The error of failing to render judgment against all the parties is therefore at most a procedural error. On collateral attack such errors may not be taken advantage of, and even on direct attack must be urged timely. *Sutherland v. De Leon*, 1 Tex. 250, 310, 46 Am. Dec. 100 (1847); *Hill & Jahns v. Lofton*, 165 S. W. 67 (Tex. Civ. App., 1914); note, 32 Am. Dec. 604; *Kimmell v. Edwards*, 193 S. W. 363 (Tex. Civ. App., 1917). In this light alone it seems that the judgment should have been sustained. But assuming that the court was justified by the line of decisions cited in converting a procedural error into a jurisdictional defect, the judgment should be accorded the presumption in favor of the verity of its recitations, for this presumption is only denied in cases in which the court is not legally organized or has no sort of jurisdiction over the subject matter or the parties whatever. *Templeton v. Ferguson*, 89 Tex. 47, 33 S. W. 329 (1895).

V. E.

MASTER AND SERVANT—RESPONSIBILITY FOR THE ACTS OF A SERVANT TEMPORARILY IN THE SERVICE OF ANOTHER.—A loaned his automobile and chauff-

feur to his mother-in-law, B. B takes an afternoon ride, leaving the selection of the route to the chauffeur. C is run over and injured due to the negligence of the chauffeur. C sues A. The lower court peremptorily instructs the jury to find for the defendant. Held, that "the rule of respondeat superior arises from the relation of principal and subordinate, and rests upon the power of control and direction, which the superior has over the subordinate"; that to overcome the presumption of the general master's liability for the act of a servant loaned to another "it is necessary that it should appear from direct testimony, or as a necessary inference from the circumstances of the transaction, that the servant was, during the period of the loan, under the control of the borrower, and not under the control of the master"; and that the question cannot be decided as a matter of law on doubtful evidence. *Hooper v. Brauner*, 129 Atl. 672 (Md., 1925).

It is well settled that upon disputed evidence the question who is master at any particular time is one of fact for the jury. *Gulf, C. & S. F. v. Gaskill*, 103 Tex. 441, 129 S. W. 345 (1910); *Grace & Hyde Co. v. Probst*, 208 Ill. 147, 70 N. E. 12 (1904). And in most jurisdictions a servant hired or loaned to another person with an instrumentality owned by his master is presumed to remain the servant of his general employer. *Delory v. Blodgett*, 185 Mass. 126, 69 N. E. 1078, 102 Am. St. Rep. 328, 64 L. R. A. 114 (1904); *Norris v. Kohler*, 41 N. Y. 42 (1869).

But there has been much difference of opinion as to what particular test to apply when it is doubtful who is master. *Laugher v. Pointer*, 5 B. & C. 547 (1826). The determination of the question who pays the wages has been held material. *Minor v. Stevens*, 65 Wash. 423, 118 Pac. 313, 42 L. R. A. (N. S.) 1178 (1911). And the Supreme Court of Massachusetts has said that he is master who has the right to select and discharge the servant. *Brow v. Boston & A. R. Co.*, 157 Mass. 399, 32 N. E. 362 (1892). The right to discharge has also been given weight by the Supreme Court of Texas. *Burton v. Galveston, H. & S. A. R. Co.*, 61 Tex. 526 (1884). But this has been shown not to be a conclusive test. *Powell v. Va. Construction Co.*, 88 Tenn. 692, 13 S. W. 691 (1890). The great weight of authority has finally accepted the question of control as the determining factor, as stated in the principal case. *Standard Oil Co. v. Anderson*, 212 U. S. 215, 29 Sup. Ct. 252, 53 L. Ed. 480 (1909). The question has been variously stated: Who has the power to control? *Byrne v. Kansas City, etc., R.*, 61 Fed. 605, 24 L. R. A. 693 (1894). Who has the right to control? *Wallace v. Southern Cotton Oil Co.*, 91 Tex. 18, 40 S. W. 399 (1897). Who has the actual control? *Grace & Hyde Co. v. Probst*, 208 Ill. 147, 70 N. E. 12 (1904).

There are two stages in fastening liability as master upon one person for the acts of another: first, the general relationship of master and servant must be proved; second, the particular act must be proved to have occurred while the servant was acting within the scope of the general employment. It is in arriving at the first stage that the tests above are peculiarly applicable. And it is therefore with reference to the solution of this preliminary question that the correctness of the tests must be determined.

The relationship of master and servant cannot be said to be based upon power to control or actual control, because the relationship is not the result of power or the actual exercise of power, but is the result of a legal agreement which creates rights. The relationship is contractual. *Parker v. Wilson*, 179 Ala. 361, 60 So. 150, 43 L. R. A. (N. S.) 87 (1912). It is therefore submitted that the test should be the right to control. *Corrigan, Lee & Halpin v. Heubler*, 167 S. W. 159 (Tex. Civ. App., 1914); *Wyllie v. Palmer*, 137 N. Y. 248, 33 N. E. 381, 19 L. R. A. 285 (1893).

The general relationship of master and servant having thus been estab-

lished, the question to finally determine responsibility would then become: Was the particular act within the scope of the servant's employment?

H. T. M.

MONOPOLY—CO-OPERATIVE MARKETING ASSOCIATIONS.—Plaintiff became a member of the defendant association for the usual co-operative marketing activities, and later sued to cancel his contract, which provided, among other things, that he should sell all wheat to the association, paying the defendant 25 cents per bushel for any sold elsewhere. *Held*, that such contracts, having penalties, are against public policy and void, since the natural effect is to permit the corporation to control the market price of grain. *Atkinson v. Colorado Wheat Growers Assn.*, 238 Pac. 1117 (Colo., 1925).

No recent case has so concisely indicated the status of the many co-operative marketing associations. Without expressly upholding the constitutionality of the statute under which later Colorado associations have been formed, the court intimates that if the question arises, it will do so. In the absence of statute, such contracts are generally held illegal as in restraint of trade, *Burns v. Wray Farmers Grain Co.*, 65 Colo. 425, 176 Pac. 487, 11 A. L. R. 1179 (1918); or better, in restraint of competition, *Reeves v. Decorah Farmers Soc.*, 160 Iowa 194, 140 N. W. 844, 44 L. R. A. (N. S.) 1104 (1913). The agricultural connections are usually ignored and the association is placed upon the same basis as any other organization restraining competition. Statutes legalizing such associations were passed in many states. To uphold the statutes, some courts thought it necessary to widen them by construction so as to give any combination "the right. . . to pool their property . . . so as to get no more than the real value of their property when sold in the market." *Commonwealth v. Harvester Co.*, 131 Ky. 551, 115 S. W. 703, 133 Am. St. Rep. 256 (1909). This case was reversed by the United States Supreme Court on the ground that the determination of the "real" value in the absence of the organization was "a problem no human ingenuity could solve." *Harvester Co. v. Commonwealth*, 234 U. S. 216, 58 L. Ed. 1284, 34 Sup. Ct. 853 (1914). However, following an enlightened public policy, state legislatures have continued to pass acts with increasing success. Our own statute (REV. CIV. STAT. 1925, ARTS. 5737 *et seq.*) effective since 1921, is extremely comprehensive, allowing the fixing in advance of liquidated damages for the breach. It has been upheld in *Texas Farm Bureau v. Stovall*, 113 Tex. 273, 253 S. W. 1101 (1923) (Cf. 2 TEXAS LAW REVIEW 125), and in *Long v. Texas Farm Bureau*, 270 S. W. 561 (Tex. Civ. App., 1925). Similar statutes have been enacted in two-thirds of the states and upheld in every court passing on them. See for citations *Dark Tobacco Growers Assn. v. Dunn*, 150 Tenn. 614, 266 S. W. 308 (1924). Congress first indicated its approval by the Clayton amendment (38 ST. AT L. 731, 1914) excepting such organizations from the Sherman Anti-Trust Act. This was followed by an act specifically authorizing such associations under Federal supervision. 42 ST. AT L. 388 (1922). Such organizations may, of course, exceed the limits of their powers as given by Federal and state statutes. *United States v. King*, 250 Fed. 908 (1916) (secondary boycott by association to prevent others trading with blacklisted firms); *Wheat Growers v. Huggins*, 203 N. W. 420 (Minn., 1925) (dictum). The doctrine of the principal case is destined to be short lived.

R. W. M'D.

PAROL EVIDENCE RULE—CONSIDERATION—RECITALS AS DISTINGUISHED FROM PROMISES.—Plaintiff had executed a deed to defendant, in which



the consideration was recited as "\$1800, secured to be paid . . . as evidenced by . . . ten . . . promissory vendor's lien notes . . . of even date herewith." The deed stated that the vendor's lien should be retained until the "above-described notes" "are fully paid, according to their face and tenor, effect and reading, when this deed shall become absolute." Plaintiff later sued in alternate counts of trespass to try title and to foreclose his vendor's lien. Both parties admitted that the notes had never, in fact, been executed. Defendant, by way of defense and cross claim, offered to prove a parol agreement whereby plaintiff should reimburse defendant for certain losses, the amount of the losses to be offset against the value of the land; no notes were to be given until the amount of defendant's losses should be ascertained. *Held*, that the recital of the consideration in the deed was recitative as distinguished from promissory, and the parol evidence was admissible to contradict the recited consideration. *Flynt v. Garmon*, 275 S. W. 444 (Tex. Civ. App., 1925) (writ of error dismissed for want of jurisdiction by the Supreme Court).

Some Texas cases contain the broad statement that testimony to show the true consideration in a deed is always admissible. *Syler v. Culp*, 138 S. W. 175 (Tex. Civ. App., 1911); *Burns v. Nichols*, 207 S. W. 158 (Tex. Civ. App., 1918). However, the true rule seems to be that recitals which are recitative or descriptive may be varied; those that are promissory or contractual may not be varied in the absence of fraud or mistake. *Coverdill v. Seymour*, 94 Tex. 1, 57 S. W. 37 (1900); *Matheson v. C-B Live Stock Co.*, 176 S. W. 734 (Tex. Civ. App., 1915); *Baum v. Lynn*, 72 Miss. 932, 18 So. 428, 30 L. R. A. 441 (1895); *Milich v. Armour Packing Co.*, 60 Kan. 229, 56 Pac. 1 (1899); 5 WIGMORE, EVIDENCE, 2d Ed., Sec. 2433; 3 TEXAS LAW REVIEW 393. The difficulty arises in applying these principles to the facts of each case. A recital of a certain amount of money "to be paid . . . in evidence of which they have executed" notes of even date with the deed, was held contractual. *Coverdill v. Seymour*, *supra*. A recital of a part of the consideration as the execution of notes of even date with the deed was held not contractual. *Conner v. McAfee*, 214 S. W. 646 (Tex. Civ. App., 1919).

It might be argued that in the case under discussion the recital contained either a promise to pay \$1800 or a promise to make notes. In either event the language does not purport to be final and all inclusive and would be subject to be supplemented by parol evidence to show the entire agreement, but could not be contradicted. *Magnolia Warehouse & Storage Co. v. Davis & Blackwell*, 108 Tex. 422, 195 S. W. 184 (1917); *Swope v. Liberty County Bank*, 52 Tex. Civ. App. 281, 113 S. W. 976 (1908). However, the recital is not promissory but is a statement of fact that certain notes have been executed. The language of the deed shows that it was not the intention of the parties that the deed should be the repository of the promise as to the payment of consideration. The promise was to be embodied in the notes. Clearly, if suit were brought on the promise, it would have to be brought on the notes and not on the deed. The recitals in this deed merely refer to the notes and are recitative. The language used in the vendor's lien clause of the deed substantiates this argument, in that it states that the vendor's lien shall be retained, not until the \$1800 is paid, but until the "above-described notes" are fully paid, according to "their face and tenor." *Coverdill v. Seymour*, *supra*, is distinguishable from the instant case, because in that case the notes were actually executed, and the parol evidence rule would prevent contradiction of the notes if not of the deed-recitals. *Lawther Grain Co. v. Winniford*, 249 S. W. 195 (Tex. Comm. App., 1923).

W. A. M., Jr.

**PARTIES—NON-JOINDER—WHEN CO-OBLIGEES MAY MAINTAIN SEPARATE ACTION.**—The defendant was a surety on the bond of P, deceased, as guardian of the estates of his five minor children. Two of these wards sued on the bond, alleging that one of the remaining three wards had released the guardian, and that the other two had refused to join the plaintiffs in the suit. *Held*, that although the guardian's bond was joint in form for the benefit of the five wards named, their interests, as obligees, were several, and since sufficient excuse for not joining the co-obligees is alleged in the petition, to wit, the prior settlement of the interests of one, and the refusal of the other two to join, the general rule that joint obligees on a bond must join in the suit does not apply, and one or more of them may maintain a separate action on the bond to recover separate interests, without joining the others. *Jones v. Puckett*, 275 S. W. 179 (Tex. Civ. App., 1925).

In an action on an obligation made in favor of several persons jointly, all joint obligees are necessary parties plaintiff, *Stachely v. Peirce*, 28 Tex. 328 (1866), *TOWNES' TEXAS PLEADING* 281, unless sufficient excuse for not joining them is alleged in the petition. *Roberson v. Tom*, 76 Tex. 535, 13 S. W. 385 (1890). This rule is based upon the theory that a recovery of a part of a joint obligation is inconsistent with any logical conception of a right, held jointly by each obligee, to the whole. *BLISS ON CODE PLEADING*, Sec. 62. It is also based upon the principle that it is manifestly unjust to allow the obligor to be exposed to two or more judgments for the same demand. *POMEROY ON CODE REMEDIES*, Sec. 193. Prior settlement of a joint obligee's interests is a sufficient excuse for not joining him. *Roberson v. Tom*, *supra*; *B. & M. Ry. Co. v. Portland, S. & P. Ry. Co.*, 119 Mass. 498 (1876). If a joint obligee refuses to join as a party plaintiff, he should be made a party defendant. *Dawson v. George*, 193 S. W. 495 (Tex. Civ. App., 1917); *Williams v. Ry.*, 82 Tex. 553, 18 S. W. 206 (1891). This is in keeping with the procedure in code jurisdictions. *Simpson v. Bantley Realty Co.*, 142 Mo. App. 490, 126 S. W. 999 (1910); *Hall v. So. Pac. Co.*, 40 Cal. App. 39, 180 Pac. 20 (1919); *Payne v. Meisser*, 176 Wis. 432, 187 N. W. 194 (1922). A well recognized exception to the general rule requiring joinder of obligees has been established in those cases where the obligation is joint in form only, and creates separate obligations to each of the obligees. *Dashley v. Daniel*, 120 C. C. A. 532, 202 Fed. 426 (1913); *Sprague v. Wells*, 47 Minn. 504, 50 N. W. 535 (1891). Since the reasons requiring the joinder of joint obligees in one action do not obtain where the obligees' interests are separate, the principal case correctly recognizes this exception.

C. W. B.

**PERSONS—DIVORCE—REMARRIAGE.**—Henry Castro was granted a divorce on the ground of cruel treatment. The trial judge placed an order in the divorce decree forbidding either party to marry within one year, except to each other. Castro disobeyed this order and was cited for contempt. From a judgment of the district court punishing him for contempt, he sued out a writ of habeas corpus. *Held*, the relator should be discharged since the order prohibiting him from remarrying within one year was entered without authority on the part of the court, and hence was void. *Ex parte Castro*, 273 S. W. 795 (Tex. Sup. Ct., 1925).

Article 4640, REV. CIV. STAT. 1925, prohibits the parties to a divorce granted on the ground of cruel treatment from remarrying within one year, except to each other. It has been anticipated by the bar that this statute was ineffective, since no punishment was provided for its violation nor was the forbidden marriage expressly declared void. 1 TEXAS LAW REVIEW 84.

The trial court, in the principal case, attempted to circumvent this apparent ineffectiveness by incorporating the substance of the statute in its decree. This was clearly erroneous, for there should not be embodied in the decree of a court the legal results of its judgment. The court in the principal case also held that the marriage was voidable and not void. In this decision it followed the great weight of authority upon the construction of similar statutes. *Woodward v. Blake*, 38 N. D. 38, 164 N. W. 156 (1917); *Mason v. Mason*, 101 Ind. 25 (1884). These courts based their decisions mainly upon the ground of public policy in upholding the legality of marriage whenever possible. But if the statute makes the parties "incapable" of marrying within a specified period, the marriage is void. *McLennan v. McLennan*, 31 Ore. 480, 50 Pac. 802 (1897).

The force and effect of the statute involved is problematical. That it is not wholly nugatory is indicated by the court in these words, "The penalty is that the second marriage may be annulled in a proper case at the suit of one having a justiciable interest therein." Just what is meant by this illusory sentence is uncertain. If it be construed as indicating that the marriage may be annulled at the instance of either of the parties, assuming knowledge of the facts by both, it is submitted that such a result would contravene the policy of the legislature evidenced by the passage of the statute, in that it would tend to encourage a new species of "trial marriages." At all events the situation is very unsatisfactory. There are two practical remedies which have proved efficacious in other states: (1) Making remarriage within the inhibited period a criminal offense; (2) entering an interlocutory divorce decree to be made final upon the expiration of the statutory period. Cf. 1 TEXAS LAW REVIEW 84.

R. G. H.

**SALES—RETENTION OF POSSESSION—DELIVERY.**—The vendor, an insolvent debtor, sold an automobile to one of his creditors but remained in possession of same. *Held*, that under the statute, all transfers other than those allowed by law, and not accompanied by an actual delivery, are conclusively presumed to be fraudulent and void against creditors and bona fide purchasers, in good faith, without notice; that the court determines whether such facts show an actual and continual change in possession. *Sankey v. Suggs*, 239 Pac. 149 (Okla., 1925).

The holding, statutory in Oklahoma, that retention of possession by the vendor is fraud per se, is the minority doctrine. *Graham v. Schooler*, 194 Pac. 1080 (Okla., 1921); COMPILED OKLA. STAT., Art. 6021 (1921); WILLISTON ON SALES, Secs. 352-3. The majority rule, followed in Texas, is that the retention of possession by the vendor creates merely a rebuttable presumption of fraud. *Bryant v. Kelton*, 1 Tex. 415 (846); WILLISTON ON SALES, Sec. 396. The reason back of each of these holdings is that possession of the goods by its original owner tends to deceive creditors and purchasers, giving the vendor a false credit. *Masters v. Teller*, 70 Okla. 668, 56 Pac. 1067 (1898); BUMP, FRAUD. CONVEYANCES, pp. 169-171. Therefore the retention of possession must be a positive and actual one on the part of the vendor, and mere constructive possession is not sufficient to raise the presumption. *Masters v. Teller*, *supra*. The Sales Act leaves the question of whether retention of possession by the vendor is fraudulent to the law of the individual states; merely providing the penalty where the fraud is shown. Sales Act, Sec. 26; WILLISTON ON SALES, Sec. 351.

This question is to be distinguished from the related one, whether actual delivery to the vendee, as distinguished from retention of possession by the vendor, is necessary to complete the vendee's title as against subsequent innocent purchasers. The majority holding, adopted by the Sales Act, is



that such a delivery is necessary. *Hallgarten v. Oldham*, 135 Mass. 1, 46 Am. Rep. 433 (1883); *Lanfear v. Sumner*, 17 Mass. 110, 113 (1821); Sales Act, Sec. 25; WILLISTON ON SALES, Sec. 349. In some cases, where the nature of the chattel will not permit an actual, manual delivery, a constructive delivery is sufficient, *Cockrum v. Johnston*, 194 Pac. 210 (Okla., 1918) (growing crops; but when the crop is harvested, the vendor must take possession); *McKibbin v. Martin*, 64 Pa. 352 (1870) (furniture in a hotel). The minority rule, followed in Texas, is that no delivery is necessary to complete the vendee's title, even as against subsequent innocent purchasers. *Lauz v. Glass*, 1 White and Willson, Sec. 1181 (Tex. Ct. App., 1881); *Ludwig v. Fuller*, 17 Me. 162, 35 Am. Dec. 245 (1840). Thus the situation in Texas is that the vendee is protected against creditors and subsequent purchasers in every case, except where there is a positive, physical retention of possession by the vendor, which creates a rebuttable presumption of fraud.

C. S. E.

TELEGRAPHS AND TELEPHONES—DAMAGES—MENTAL SUFFERING.—A telegram telling of the death of the addressee's brother John was telephoned to the wrong person, causing him to go where his own brother John was living and suffer great mental anguish until the mistake was discovered. *Held*, that plaintiff, not being a party to the contract, could not recover for mental anguish caused by the negligent delivery to him of a death message addressed to another. *Gardner v. Cumberland Telephone Company et al.*, 268 S. W. 1108 (Ky., 1925).

Jurisdictions that deny recovery for mental anguish in telegraph cases follow the common law rule that mental anguish is not an item of recoverable damages unless it is attended by bodily injury. *Western Union Telegraph Company v. Chouteau*, 28 Okla. 664, 115 Pac. 879, 49 L. R. A. (N. S.) 207 (1911). Of the eleven states that allow recovery for mental anguish in telegraph cases, Arkansas, South Carolina, Wisconsin and Tennessee rely on statutes; Iowa, North Carolina, Nevada and Louisiana allow recovery in tort or contract; *Mentzer v. Western Union Telegraph Company*, 93 Ia. 752, 62 N. W. 1 (1895); while Texas, Alabama and Kentucky are supposed to allow recovery only in actions *ex contractu*; *G., C. & S. F. Ry. v. Levy*, 59 Tex. 542, 563 (1883); *Western Union Telegraph Company v. Waters*, 139 Ala. 652, 36 So. 773 (1904). The Federal rule denies recovery, and statutes providing a different rule for interstate telegrams have been held unconstitutional. *Western Union Telegraph Company v. Brown*, 234 U. S. 34, 58 Law. Ed. 1457, 34 Sup. Ct. 996 (1914).

It is believed that damages for mental suffering in these cases may legitimately be allowed: (1) In a contract action where such damage was in reasonable contemplation, whether in telegraph, *Stuart v. Western Union Telegraph Company*, 66 Tex. 580, 18 S. W. 351 (1895); or in other cases, *G., C. & S. F. Ry. v. Coopwood*, 96 S. W. 102 (Tex. Civ. App., 1906); *Dunn v. Smith*, 74 S. W. 576 (Tex. Civ. App., 1903); *Pullman Company v. Moise*, 187 S. W. 249 (Tex. Civ. App., 1916); (2) in tort actions where it should reasonably have been foreseen that if due care was not exercised in the conduct of defendant or his business such damage would result; *Mentzer v. Western Union*, *supra*; *Young v. Western Union Telegraph Company*, 107 N. C. 370, 11 S. E. 1044 (1890); *Western Union Telegraph Company v. Snodgrass*, 94 Tex. 284, 60 S. W. 308 (1901); but never where the injury is not substantial; *G., C. & S. F. Ry. v. Trott*, 86 Tex. 412, 25 S. W. 419 (1894); *Western Union Telegraph Company v. Arnold*, 96 Tex. 493, 73 S. W. 1043 (1903); or where the damage was not caused either by the

breach of contract or a tortious wrong, as in *Rowell v. Western Union Telegraph Company*, 75 Tex. 26, 12 S. W. 534 (1889); *Akard v. Western Union Telegraph Company*, 44 S. W. 538 (Tex. Civ. App., 1897).

Throughout the "telegraph" decisions there is a recognition that the mental distress is the major item of damages. The price of the message is inconsiderable compared with the suffering caused by missing the funeral of a near relative. *Stuart v. Western Union*, *supra*. The courts have extended protection as far as possible under the contract theory, to beneficiaries of telegrams. *Horn v. Western Union Telegraph Company*, 109 Tex. 229, 194 S. W. 386 (1917). In allowing recovery, the courts speak the language of tort law. *Stuart v. Western Union*, *supra*. But if the pleading is not laid as an action on contract, the pleader is out of court because he has chosen the wrong form of action; and this in a jurisdiction where forms of action are abolished and the same type of damage has resulted from both classes of wrong. This situation is criticized in *Lawson v. Haskell Telephone Company*, 224 S. W. 390 (Tex. Civ. App., 1920) upon the ground that public service corporations should be under a duty to act with reasonable care toward all whom they serve. The telegraph company has been held fully liable for pecuniary damage resulting solely from its negligence in receiving and delivering a message sent over its wires by a tapper. *Western Union Telegraph Company v. Uvalde National Bank*, 97 Tex. 219, 77 S. W. 603 (1903). It is hard to see a basis for the refusal to allow recovery in a similar case for mental anguish. The Supreme Court of Texas has so far departed from the limitations of the strict contract theory as to hold the telegraph company liable for negligence in failing to deliver a message to a person with whom it had no contractual relation, an undertaking negligently performed being sufficient to impose liability. *Western Union Telegraph Company v. Snodgrass*, *supra*. The Kentucky court had an even greater opportunity to rationalize the doctrine. The plaintiff was not prevented merely from attending a near relative's funeral (the orthodox death message case, for which recovery is allowed), but was caused to suffer a much deeper emotional disturbance, having been led to believe that his brother was dead. The refusal of the court to give recognition to this much stronger case indicates the halting steps taken by courts in working out the limits of protection for a newly recognized interest.

1 STREET, FOUNDATIONS OF LEGAL LIABILITY 470.

J. C.

**THEFT INSURANCE—"THEFT" CONSTRUED.**—The plaintiff insured his automobile, under a policy which stated he would be indemnified against loss by "theft, robbery, and pilferage." The plaintiff executed a contract of sale for the car, and transferred possession and title to the vendee, who paid therefor with a forged check. *Held*, that such fraudulent transaction does not constitute a "theft," as the term is given its ordinary meaning. *Royal Insurance Co. v. Jack*, 148 N. E. 923 (Ohio, 1925).

There are various constructions given to the term "theft" in insurance policies. Some courts adopt a liberal construction, holding that any scheme, whether involving false pretense or other fraudulent trick or device, whereby the assured is swindled out of his property, comes within the meaning of the term. *Hill v. North River Ins. Co.*, 111 Kan. 225, 207 Pac. 205 (1922); *Overland-Reno Co. v. International Indemnity Co.*, 115 Kan. 137, 222 Pac. 122 (1924). These decisions accord with the general rule, that wherever a clause in a policy of insurance admits of more than one construction it should be construed in favor of the assured. *Security Ins. Co. v. Sellers-Sammons-Signor Motor Co.*, 235 S. W. 617 (Tex. Civ. App., 1921). How-

ever, the majority of courts require a compliance with the criminal law construction of "theft." Any wrongful taking is not sufficient, there must be a criminal intent. *Gunn v. Globe and Rutgers Fire Ins. Co.*, 24 Ga. App. 615, 101 S. E. 691 (1919). The familiar distinction both of the common law and most of the state penal codes, that where the vendor intends to pass title to the defrauder, no theft can be thereby consummated; but where the vendor intends to pass only possession, theft by false pretext is committed, is applied to the term in an insurance policy. *Illinois Auto. Ins. Exch. v. Southern Motor Sales Co.*, 207 Ala. 265, 92 So. 429 (1922). The Texas courts apply the strict criminal law construction to the term. *Automobile Underwriters v. Rhinehold*, 255 S. W. 1116 (Tex. Civ. App., 1923) (the Texas statute on theft by false pretext being cited). Accordingly, the Texas courts indicate that they would construe theft as defined by the Penal Code, even though it would not constitute larceny under the common law. *Fidelity Phoenix Fire Ins. Co. v. Oldsmobile Sales Co.*, 261 S. W. 492 (Tex. Civ. App., 1924). Thus the majority rule, in spite of statements that the term be given a reasonable construction, really amounts to applying the statutory definition.

J. W. M.



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## MODERN ENGLISH LEGAL PRACTICE

The history of the development of legal procedure in England during the nineteenth century indicates in a general way what characteristics that procedure would almost necessarily possess. The dominating influence of the laity could hardly fail to create a wide gap between the traditional conceptions and current methods, and the changes introduced naturally appear quite revolutionary to the American lawyer. As one sits in an English court room, and watches the progress of a case, it does not seem like a professional performance. One hears no technical objections to the proceedings, and very little technical language. The skill of the participants is directed almost exclusively toward the result to be reached, and the details of the method by which the trial or the hearing is conducted are given very slight attention. Obviously there is a right way to do things, which is followed almost unconsciously by the court and counsel. Things proceed with a frictionless rapidity and a vigorous directness which is fairly alarming to a conservative disciple of the traditional common law procedure. Before one realizes that the case is fully under way, counsel announce that they rest, the jury is instructed so clearly and so naturally that one is astonished at the simplicity of the issues. Decisions are reached by the jury with the most businesslike promptness. The court seems like a commercial organization in which the participants are devoting their undivided attention to the investigation, discussion, and decision of a problem which they are there to solve. There is no lost time and no lost motion. Every step counts. It is a court conducted by highly trained lawyers in the manner of highly trained business executives. One can feel at every turn that the ideal before it is not regularity but efficiency. The public, not the profession, is obviously in ultimate control.

The greatest weaknesses in the common law system of procedure were the technical rules of pleading, the lack of special methods for

dealing with special classes of cases, the want of an adequate system of disclosures before trial, the stilted, unnatural, and ineffective methods of dealing with witnesses and juries, and the technical machinery for appellate review. It will perhaps be profitable to take up each of these features and glance at the way in which England has dealt with the problems involved.

### 1. PLEADING

There are practically no technical rules left in the subject of pleading. All persons may join as plaintiffs in whom any right to relief is alleged to exist, whether jointly, severally or in the alternative, subject to the right of the court to order separate trials for one or more of them if deemed expedient (Order 16, Rule 1). The same freedom of joinder is allowed in the case of defendants, subject to the same right to order separate trials (Order 16, Rules 4, 5). If an action is brought in the name of the wrong plaintiff, the right party may be substituted by leave of court (Order 16, Rule 12). No action can be defeated by reason of misjoinder or nonjoinder of parties, but the court may deal with those before it as shall be just and may drop parties or add them at any stage of the proceedings (Order 16, Rule 11). If a defendant claims contribution or indemnity over against any third person not a party to the action, he may have such third party brought in so as to obtain a judgment over against him without a separate action (Order 16, Rules 48-55). In case of the death, marriage, or bankruptcy of any party, or the happening of any other event causing a change or transmission in interest or liability, the proper party may be substituted or added and the action shall not abate (Order 17).

From this summary of the rules as to parties it is very clear that there are practically no risks, even of substantial inconvenience, resulting from errors. The mistake, whatever it may be, is simply corrected when pointed out, and nothing further happens.

The pleadings themselves are designed merely to give sufficient notice, and no technical objections can be raised to any pleading on the ground of want of form (Order 19, Rule 26). The court has prepared a large number of very short and simple forms to be used as models, and the lawyers are charged with costs if their pleadings are more prolix than the official forms (Order 19, Rule 1). There are no demurrers, but further and better pleadings may be ordered at any time (Order 19, Rule 7). Practically all causes of action may be joined, subject to the right of the court to order separate trials (Order 18, Rule 1), and any matters may be set up as counter-

claims, even though they involve the bringing in of additional parties, subject to the same right of separation for trial (Order 21, Rules 10-12). Amendments may be allowed of any kind, at any time, on order of the court, and all amendments *must* be allowed which are necessary to determine the real controversy between the parties (Order 28, Rule 1). Pleading under these rules has certainly lost its terrors, and it is hard to see how the merits of a case could ever be jeopardized by errors of the pleader. Indeed, the subject has become so simple and is treated so sensibly, that during the twenty-three years from 1898 to 1920, MEWS ENGLISH DIGEST shows only eighty-five cases in the English reports dealing with the field of pleading and parties.

## 2. SEGREGATION OF CASES REQUIRING SPECIALIZED TREATMENT

The common law system of procedure had an astonishing want of flexibility in dealing with different classes of cases. It was based on the totally false assumption that all litigation should proceed along identical lines irrespective of its particular nature, like a railroad system which should develop a single type of car to be used interchangeably for passengers, live stock, or freight, or a factory in which the same machinery would be employed to turn out automobiles, cotton cloth, and optical instruments.

There are two classes of cases which should never go through the ordinary machinery of litigation. One class consists of those cases in which there is no bona fide issue to try which should result immediately in a summary judgment; the other consists of those cases in which a declaration of rights rather than a judgment for relief is desired by the plaintiff. The English practice has successfully segregated both these classes and kept them off the regular dockets, and they are very rapidly and effectively disposed of by special proceedings adapted to their needs.

### (a) *Summary Judgments*

Summary judgment procedure, in essence, is nothing but a process for the prompt collection of debts. It was never employed by the common law courts, because they developed all their rules of procedure as mere by-products of controversial litigation, and such litigation is not adapted for collecting debts. Machinery for that purpose must provide a test to determine that the plaintiff has a debt and not a controverted claim, and a means for getting an immediate judgment without the expense and delay of a trial. The English practice does both of these things with neatness and dispatch.



The creditor issues a summons with a description of the debt indorsed upon it, files an affidavit of the truth of his claim and of his belief that there is no defense, and upon that showing, without pleadings and without the aid of counsel, he may bring the debtor before a high court master on four days' notice to show cause why a summary judgment should not be forthwith rendered against him. The burden is thus placed upon the debtor to satisfy the master, by convincing proofs, that he ought to be given the right to litigate the claim. No formal gesture, such as the affidavit of merits so often provided for in our summary judgment acts, will suffice. The masters want solid assurances, and sham defenses are ruthlessly rejected. Under the skillful hands of the masters these cases are disposed of very rapidly, five or ten minutes being usually enough. Very large judgments, running into thousands or even millions of dollars, are constantly being rendered in this summary way.

The immense value of the practice is indicated by its wide use. In the year 1923, for example, there were 6773 summary judgments rendered by the masters of the King's Bench Division, as compared with 1546 judgments entered by the judges after trial of issues. That means that by this device the trial dockets were relieved of 80 per cent of the cases which would otherwise have come before the courts for formal trial, and that claimants in all those cases got their judgments in as many days as it would have required months through ordinary litigation in the courts.

Two American jurisdictions have adopted the English summary judgment practice. New Jersey did so in 1912, when it completely revised its procedure in accordance with the English rules. New York did so in 1921. Perhaps because it was only one item in a large program of procedural reform, the constitutionality of the summary judgment statute was not seriously assailed in New Jersey, but in New York, with true professional hostility to change in legal practice, the summary judgment act was promptly required to run the constitutional gauntlet, on the ground that it invaded the right of trial by jury. Fortunately the attack failed. In *General Investment Company v. Interborough Rapid Transit Company*,<sup>1</sup> the Court of Appeals held that the provision was

simply one regulating and prescribing procedure, whereby the court may summarily determine whether or not a bona fide issue exists between the parties to the action. A determination by the court that such issue is presented requires the denial of an application for summary judgment and trial of the issue by jury

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<sup>1</sup>235 N. Y. 133, 139 N. E. 216 (1923).

at the election of either party. On the other hand, if the pleadings and affidavits of plaintiff disclose that no defense exists to the cause of action, and a defendant, as in the instant case, fails to controvert such evidence and establish by affidavit or proof that it has a real defense and should be permitted to defend, the court may determine that no issue triable by jury exists between the parties and grant a summary judgment.

The practice is being employed with rapidly increasing frequency in New York. It went into effect October 1, 1921. In Manhattan county, 11 motions for summary judgments were made during the remainder of that year; in 1922 there were 174 such motions; in 1923 there were 447; and in the year 1925 about 700.<sup>2</sup>

Every state in this country urgently needs a device like the English summary judgment rule, to avoid the fraudulent delays by which justice is denied to those who only ask for what is admitted to be their due. In a land where time-saving methods are as highly valued as in the United States, the lack of an adequate means for the prompt collection of debts through judicial process is an inexcusable defect.

#### (b) *Declarations of Rights*

The other class of cases which the English segregate for special treatment, consists of applications for declarations of legal rights, without demand for other relief. They usually present limited issues, often largely of law, which can be disposed of in much less time than cases brought in the ordinary way. Most of these cases ask for the construction of deeds, wills, contracts or other written instruments, statutes or governmental orders.

The practice enables parties to bring questions before the courts for determination at an early period in the controversy, when few complications have arisen, and when the adjudication of a simple issue of construction may save parties from doing acts and committing themselves to courses of conduct which may afterwards be very difficult to deal with. At this stage no damages have yet been suffered, no steps have been taken which will have to be retraced, and no rights of third parties have intervened. Taken in time, the controversy may be kept within very narrow limits, and the decision will almost amount to an amicable adjustment under the advice of the court. Legal conflicts between individuals are evidences of social friction, and a wise government will be anxious to offer a remedy at the earliest possible moment.

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<sup>2</sup>See FINCH, Summary Judgments Under the New York Practice Act, 49 AM. BAR ASS'N REP. 588 (1924).

The service rendered by the courts under the declaratory judgment practice is quite analogous to that rendered by modern hospitals which diagnose and treat diseases in their incipient stages and thereby prevent the development of more dangerous conditions.

So useful and effective has this practice become in England that several judges of the high court are frequently engaged simultaneously in making declarations of rights, and the size of the dockets which they dispose of is eloquent testimony of the speed with which the work can be done.

The theory of the declaratory judgment is strictly in accord with our modern conceptions of the function of a civilized state. In early times the basis of jurisdiction was the constant assertion of physical power over the parties to the action, but as civilization advances the mere existence of such power tends to make its exercise less and less essential. If our civilization is not a sham, and the state is understood to be equal to the task of enforcing the decrees of its courts, a mere declaration may serve every purpose of an order, and the order will become unnecessary. A declaration by the court that A is entitled to the immediate possession of a chattel in B's possession, should be equally effective in A's behalf as a judgment that A do have and recover of B the possession of the chattel. A judicial declaration that a certain city ordinance is invalid ought to serve equally as well as an injunction against its enforcement. Furthermore, the remedial possibilities in such declaratory judgments are much greater than in judgments for relief, and they open up an entirely new field for judicial usefulness.

Every case may by this means become, in appearance at least, a friendly suit. There is no doubt that the personal animosities developed by litigation are serious drawbacks to the usefulness of the courts. To sue is to fight, and fights make endless feuds. Parties hesitate to resort to the courts because they shrink from a state of war with their neighbors or business associates. But if the courts could operate as diplomatic instead of belligerent agencies, less hesitation would be felt over recourse to them, and less strain would be put upon the friendly relations of the parties. To ask the court merely to say whether you have certain contract rights against the defendant is a very different thing from demanding damages or an injunction against him. When you ask for a declaration of right only, you treat him as a gentleman. When you ask coercive relief you treat him as a wrongdoer. That is the whole difference between diplomacy and war; the former assumes that both parties wish to do right, the latter is based on an accusation of wrong. A request for a declaration of right plainly implies full confidence that the



defendant will promptly and voluntarily do his duty as soon as the court points it out to him. It makes the lawsuit a cooperative proceeding, in which the court merely assists the parties to settle their own differences by stating to them the rules of law which govern them. These considerations alone are enough to recommend the practice in any country where respect for the rights of others is considered a virtue. The force behind the court is not at all weakened by it, for if it appears that the plaintiff's confidence in the defendant's readiness to do right is misplaced, the coercive decree of the court is always ready to be promptly issued in support of its declaration.

But the declaratory judgment procedure is much more than a new method for accomplishing an old purpose. It has actually enlarged the boundaries of judicial action. According to the conventional view of common law jurisprudence, the courts take jurisdiction only in case of an actual or threatened wrong. Until that occurs there is nothing upon which they can act. This was very clearly pointed out by the Supreme Court of New Hampshire in *Greely v. Nashua*,<sup>3</sup> where it said in regard to a bill filed to determine rights claimed under a will:

The plaintiffs . . . request the court to inform them what their legal rights and those of the defendants are in the property devised. The court might with equal propriety be called upon by the parties interested to advise them regarding the title to land, the construction of a contract, or any other question of law. Such questions are not ordinarily adjudicated until it becomes necessary to decide them in proceedings instituted for the redress of wrongs.

And in *Bevans v. Bevans*,<sup>4</sup> a bill was filed to obtain the construction of a will with respect to the title to real estate. The Chancellor of New Jersey said:

. . . It is settled that the court will not express opinions in regard to construction for the mere information of parties, disconnected from some equitable relief sought.

The English rule is designed to permit courts to do exactly what the New Jersey court said would never be done, namely, to express opinions for the mere information of parties. The common law never looked upon the courts as agencies useful for enabling parties to keep out of trouble. That was the business of the lawyers. It never admitted that anyone had a legal right to know what his rights were.

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<sup>3</sup>62 N. H. 166 (1882).

<sup>4</sup>69 N. J. Eq. 1, 59 Atl. 896 (1905).

The rule authorizing declaratory judgments in cases where no relief is possible, gives one the right to know his rights. Since ignorance of the law excuses no one, the law will furnish an oracle to declare it. Assuming that parties intend to do right, it will point out the way they should go. The field which the new practice opens is a wide and fruitful one. It furnishes remedies which no civilized country ought to deny to its citizens.

In the absence of an opportunity to obtain declaratory relief, a client can do no more than consult his lawyer. But the lawyer's opinion is without the slightest binding force. Vast interests may be at stake, but all the client can do is to gamble on the sagacity of his counsel. In England such compulsory gambling has long been outgrown. The client consults his lawyer, the lawyer, in case of doubt, frames a case for the court, and the court, on a full hearing *with all interested parties before it*, makes a final and binding declaration on which the client can act with perfect security.

The following examples taken from a single random volume of the CHANCERY REPORTS<sup>5</sup> will show the range and character of the questions which may be presented to the court under the declaratory judgment procedure: In *Lovesy v. Palmer*<sup>6</sup> plaintiff asked for a declaration that certain memoranda and letters constituted a binding contract between the defendants and the plaintiff to make a lease of a theater. In *Smith, Coney & Barrett v. Becker, Gray & Co.*<sup>7</sup> the plaintiff asked for declarations that certain contracts which they had made with defendants were illegal by reason of the proclamation of a state of war between Great Britain and Germany. In *re Ludwig*<sup>8</sup> the plaintiff asked the court to declare whether certain trusts were void for remoteness. In *re New Chinese Antimony Co., Ltd.*,<sup>9</sup> the liquidator of a company asked the court to determine and declare the correlative rights of the preferred and common shareholders to the assets of the company. In *re Chafer and Randall's Contract*<sup>10</sup> plaintiff asked a declaration that the abstract of title delivered by the defendant to the plaintiff did not show a good title. In *Cassel v. Inglis*<sup>11</sup> plaintiff asked the court to declare that he had been illegally excluded from membership in the Stock Exchange. In *Cole-*

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<sup>5</sup>[1916] 2 Ch.

<sup>6</sup>Page 233.

<sup>7</sup>Page 86.

<sup>8</sup>Page 26.

<sup>9</sup>Page 115.

<sup>10</sup>Page 8.

<sup>11</sup>Page 211.

*man v. London County and Westminster Bank, Ltd.*,<sup>12</sup> the court was asked to decide the question of priorities in certain debentures as between the plaintiff and defendant. In *Parsons v. Equitable Investment Co., Ltd.*,<sup>13</sup> the court was asked to declare that a certain bill of sale was void because it failed to truly state the consideration for which it was given. In *Pearce v. Bulteel*<sup>14</sup> a declaration was asked as to who were the owners of certain property. In *Gilbert v. Gosport and Alverstoke Urban District Council*<sup>15</sup> plaintiff asked the court to declare that he owned certain land free of any public right of way. In at least twenty cases in the same volume the court was asked to construe wills or make declarations as to rights acquired under wills, involving such questions as: whether certain funds should be paid to a life tenant as income or retained by the trustees as capital,<sup>16</sup> whether the words "lawful issue" were restricted to children or included remoter descendants,<sup>17</sup> to what bequests a provision against lapse applied,<sup>18</sup> whether farm laborers were "servants" within the meaning of a bequest,<sup>19</sup> whether a devise of land was subject to a water pipe easement,<sup>20</sup> and many others, most of them involving, but others not involving, trusts. In the last volume of CHANCERY REPORTS which I have at hand,<sup>21</sup> out of 40 cases reported, 29 were for declarations of rights.

Declaratory judgments have recently been attracting much interest in the United States. The first general statute authorizing them was passed in Michigan in 1919, but was held unconstitutional on the extraordinary ground that declaring the rights of parties was not a judicial function. *Anway v. Grand Rapids Ry. Co.*<sup>22</sup> But while this decision encouraged similar constitutional attacks in other states which subsequently enacted similar legislation, no other court has ever been persuaded to follow the reasoning of the Supreme Court of Michigan. The last decision in which the validity of the practice was seriously argued and considered was *Petition of Kariher*,<sup>22a</sup> in

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<sup>12</sup>Page 353.

<sup>13</sup>Page 527.

<sup>14</sup>Page 544.

<sup>15</sup>Page 587.

<sup>16</sup>Page 331.

<sup>17</sup>Page 362.

<sup>18</sup>Page 368.

<sup>19</sup>Page 386.

<sup>20</sup>Page 459.

<sup>21</sup>[1925] 1 Ch.

<sup>22</sup>211 Mich. 592, 179 N. W. 350 (1920).

<sup>22a</sup>131 Atl. 265 (Pa., 1925).



which its constitutionality was thoroughly demonstrated by the Supreme Court of Pennsylvania. No less than eighteen states are now using it, and it is hoped that Congress may in due time pass the bill now being urged by the American Bar Association. In many states they are already losing their novelty. I was recently told by a member of the Kansas Supreme Court that declarations of rights had become so common in that state that the reporters seemed to think them no longer worth noting as such.

### 3. DISCLOSURE AND DISCOVERY

Having eliminated from the trial docket the cases calling for summary and declaratory judgments, the next problem is to provide the parties to the cases which must be regularly tried with all the information which is necessary to enable them to prepare for trial. Instead of conniving at the instinctive desire of counsel to keep his adversary as far as possible in the dark, lest by obtaining information he should become more formidable, the English rules provide for the most thorough disclosure and discovery.

Discovery is one of the primary titles in the books on English procedure. From a minor doctrine in the chancery practice it has grown into a controlling principle embracing all litigation in the high court. Practically every case, commenced in the ordinary way, is sent at once to a master on a summons for directions, who makes an order mapping out the course which it is to follow, and the main purpose of the order is to specify and direct the discovery which must be made forthwith.

If there are facts which either party believes will not be actually disputed, although formally in issue, and which he wishes to avoid the expense of proving, he may have an order calling upon his adversary to admit them. Unreasonable refusal to make such admission will load the cost of proof, after it has been successfully produced, upon the party who refused to admit. The practice is admirable, for such admission not only saves expense to the parties but saves the time of the courts in hearing proofs.

If there are matters regarding which either party wishes to obtain information from the other, he may have an order allowing him to put interrogatories which must be answered under oath.

And most important of all, each party is entitled, almost as a matter of course, to an order requiring the other party to furnish a sworn list of all the documents—whether admissible in evidence or not—which he now has, or ever has had, in his possession, relating to the matter involved in the suit. *Compagnie Financière du Pacifique*

*v. Peruvian Guano Co.*<sup>23</sup> This list must embrace everything in writing or printing capable of being read. *Rex v. Daye*.<sup>24</sup> It must be set forth in two schedules. The first must contain all the documents that are in the possession or power of the deponent, and must be subdivided into those which he is willing to produce and those which he is not willing to produce; the second must contain all the documents no longer in the deponent's possession, with a statement as to what became of them and in whose possession they now are.<sup>25</sup> Upon the receipt of this list, the party usually gives notice in writing to produce such documents as he wishes to inspect,<sup>26</sup> and within a few days, subject to the possibility of an argument regarding the documents not willingly produced, by this simple and effective means, each party is supplied with copies of all the documents which he is entitled to inspect and which are known to be in existence, bearing upon the case.

There is nothing in the English court system which proceeds under such speed and pressure as a hearing before a master on a summons for directions. The solicitors are not allowed the luxury of a seat, but stand at a sort of high desk before the master, and are hardly given time to gather up their papers before the next group of solicitors has crowded forward to take their place. Each of the masters has a docket of sixteen or eighteen cases per hour, and he usually finishes the list on time. The summons for directions, by which the vast scheme of discovery is largely administered, is thus a tremendously efficient instrument.

It is, of course, impossible to determine how much court time is saved by these preliminary admissions, answers to interrogatories, and disclosures of documents, but an observer who compares the time used in an English trial with that ordinarily consumed by a similar trial in the United States, and notes the points at which speed is secured by reason of prior discovery, might perhaps estimate a fifty per cent saving. With the facts on each side mutually understood by both parties when the trial opens, leading questions no longer become objectionable on many features of the case, and the witness is brought at once to the point in controversy with no waste of time over formal preliminaries; the necessity for cross examination is greatly reduced, and it is frequently omitted altogether; the formal introduction of evidence is largely dispensed with, for complete type-

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<sup>23</sup>[1882] 11 Q. B. 55.

<sup>24</sup>[1908] 2 K. B. 333.

<sup>25</sup>11 HALSBURY'S LAWS OF ENGLAND, 59, 60.

<sup>26</sup>11 HALSBURY'S LAWS OF ENGLAND, 68.

written sets of copies of the documents previously inspected are already in the hands of the judge and of counsel on each side when the trial begins, and they are usually introduced by consent; formal admissions of facts, and answers to interrogatories, eliminate entirely many features of the case which with us would call for extensive proof. With the element of surprise largely out of the case at the opening of the trial, there is no occasion for that elaborate maneuvering for advantage, that vigilant and tireless eagerness to insist upon every objection with which we are so familiar, and which not only prolongs and complicates the trial, but helps to make the outcome of an American lawsuit turn as much upon the skill of counsel as upon the merits of the case.

Our bar has always been inclined to fear and distrust disclosure before trial. They have thought it would tend to produce framed-up cases and perjured testimony. But it must not be forgotten that want of disclosure causes great delay, inconvenience and expense in the preparation for trial, seriously prolongs the trial itself to the prejudice of the parties, the witnesses, the jurors and the court, and results in a defective and inadequate presentation of the real merits of the case, thereby diminishing public confidence in the ability of the courts to find the truth. In the development of the law of evidence, every reform has been opposed on the same ground,—that it would tend to encourage perjury. It is hard to realize that no longer ago than 1851, Lord Brougham's Act for the first time made parties competent witnesses in civil proceedings in the superior courts. There was great dread of the act, lest the interest of parties should encourage false swearing. Lord Campbell wrote in his *Journal* on June 19, 1851:

"It (the Bill) is opposed, as might be expected, by the Lord Chancellor. I support it, and I think it will be carried, although all the common law judges, with one exception, are hostile to it."

But the fear felt by the legal profession was groundless, as events proved. The history of reforms, both in pleading and in evidence, has shown a continuous tendency to remove more and more restrictions on the disclosure of the truth. The spirit of the times calls for disclosure, not concealment, in every field,—in business dealings, in governmental activities, in international relations, and the experience of England makes it clear that the courts need no longer permit litigating parties to raid one another from ambush.

A case recently tried in Michigan illustrates the immense advantages to be derived from a full disclosure of documents before trial.



This was *Wilson v. White*,<sup>27</sup> a chancery case, which was tried in the circuit court in Detroit for eighteen consecutive weeks. Most of the evidence consisted of letters forming a voluminous correspondence, and attorneys who participated in the trial have estimated that the actual reading of those letters in court when they were being introduced in evidence consumed an aggregate of twelve weeks of time. Under the English practice copies of all of those letters would have been placed on the judge's desk and on each attorney's table at the trial, most of them would in all probability have been admitted by consent, and the chief task would have been simply to argue their force and effect, as one argues a record on appeal.

#### 4. THE TRIAL

The most important feature of English trial practice is the dominating position of the judge, and many observers have expressed the view that in this fact lies the real explanation of English success in judicial administration. He carries much greater responsibility than the ordinary American judge for the proper conduct of the trial, on the apparent theory that the state does not stand indifferent as to suitors, but is directly interested in the due administration of justice as a public function. It would seem self-evident that miscarriages of justice impair the confidence of the people in the administrative capacity of the government, and that the responsibility for such failures cannot be thrown upon the parties and their counsel. If the state forces its citizens into public courts of justice, it should carry at least as much responsibility as private parties engaged in public callings who are required to use a rather high degree of care in furnishing adequate facilities. For the judge to allow any sort of lax and incompetent conduct on the part of the lawyers so long as neither of them raises an objection, and to permit the jury to blunder into a verdict in the absence of obviously necessary evidence, on the basis of clearly incompetent testimony, and without aid of essential instructions on the law, merely because counsel make no effort to prevent it, is not the way to inspire respect for the administration of justice. The English theory of state responsibility lays the duty of active supervision and direction upon the judge.

The logic of the English scheme of trial practice is thoroughly sound. There are three official agencies involved in a trial, the judge, the jury, and the attorneys, and the main problem of trial practice is to make them cooperate most effectively in arriving at the merits of the controversies. Two of them, the judge and the jury, should

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<sup>27</sup>233 Mich. 497 (1926).

be non-partisan, because they are required to decide disputed questions between the litigants, while the attorneys, whose task it is to present the rival claims of the contestants, must of necessity be strongly imbued with the zeal of the advocate. Now the English theory of an efficient trial procedure seems to be predicated upon a distribution of the various proceedings embraced in the trial in such a way that those requiring impartiality shall not be delegated to the attorneys, and that those, on the other hand, which involve partisan interest shall be placed in the hands of the representatives of the contending parties.

Such a classification of the steps in a trial is perfectly easy. Since the selection of the jury is something which should be absolutely divorced from partisan influence, the empanelling should not be done by the attorneys. The opening statement of the claims of the contestants, if it is to be made forcibly, *must*, on the other hand, be the work of the attorneys, and the same is true of the offering of evidence and arguments relative to its force and effect. But the jury should be instructed on the law with complete impartiality, and in this the attorneys should have no hand, and the same is true of the summing up of the evidence and the supervision of the form of the verdict. If, therefore, each branch of the tribunal is to do what it is best fitted for, and is to refrain from attempting to do those things which are inconsistent with its nature and character, the jury will be empanelled by the judge or other court officer without and interference by the attorneys, and will be instructed on the law and informed (by way of summing up) upon the facts by the impartial action of the judge, who will decide without any partisan advice or pressure as to what should be said to the jury. And finally, since the verdict is the judicial decision of the jury, and its value and effect may depend upon its form, an impartial direction and control should be exercised over this vital feature of the trial in the interests of both parties, indifferently, which, of course, points to the judge as the proper guide.

This theoretical division of functions in the interests of a fair trial is the absolute rule of practice in the English courts.

Five minutes before the court opens, the clerk calls twelve jurors into the box—usually ten men and two women—and promptly swears them to try the case. As he finishes this brief and simple ceremony, the judge steps through a door behind the bench, bows to the barristers and to the jury, takes his seat, and the trial is under way.

The empanelling of an English jury is a dignified and impressive performance. They have already been selected for character and intelligence, like the judges themselves, and their names can be obtained

by counsel for a shilling, in advance of the trial, if there is any desire to investigate them with a view to a challenge. As a matter of fact, this list is almost never asked for. The clerk, as the representative of the government, not of the parties, draws and swears them, thus giving them a status independent of the contending parties, like that of the judge on the bench. Freed from the hostile inquisition of the rival lawyers, the jurors undoubtedly approach the case in a much more judicial frame of mind than would be possible under the American practice, and this clearly manifests itself in a closer cooperation between jury and judge.

English counsel state their cases well, put in their evidence carefully and thoroughly, and argue the facts with simple directness, without any attempt to carry the jury by emotional appeals or by flights of eloquence. This rather cold and businesslike attitude toward the jury is doubtless due to their conviction of the futility of any other course. For the judge has the last word with the jury, and no emotional effects could stand against the clear, cold summing up of an English judge, who has followed every move in the trial with experienced skill, taking diligent notes of all the salient features of the case. The judge is expected to see to it that the jury get a properly balanced view of the case, and if one side is pressed too hard the judge must correct it. In *Hepworth's Case*<sup>28</sup> complaint was made that the judge made derogatory observations upon the argument of appellant's counsel, but the Court of Criminal Appeals said that no harm had been done, for counsel had made a very eloquent speech and the judge had only tried to administer an antidote.

The value of a summing up is not appreciated in the United States, but in England it is considered the most important function of the judge. Doubtless that strange and anomalous rule followed by most of our state courts, which forbids comment by the judge on the weight of the evidence, has created so great a risk of error in summing up that our judges hesitate to take the chance, and either omit the summing up entirely or make it quite formal and perfunctory. A few weeks spent in watching jury cases tried in England will convince one that the summing up does more to secure a verdict based on the merits of the case than all the rules of evidence which legal ingenuity has devised.

Dicey, in his *LAW OF THE CONSTITUTION*, says:<sup>29</sup>

Trial by jury is open to much criticism; a distinguished French thinker may be right in holding that the habit of submitting

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<sup>28</sup>4 Cr. App. 130.

<sup>29</sup>8th Ed., pp. 389-390.

difficult problems of fact to the decision of twelve men of not more than average education and intelligence will in the near future be considered an absurdity as patent as ordeal by battle. Its success in England is wholly due to, and is the most extraordinary sign of popular confidence in the judicial bench. A judge is the colleague and the readily accepted guide of the jurors.

Even more novel to an American lawyer is the English practice as to instructing a jury upon the law. Counsel have no more to say about the judge's charge than about his summing up. Instead of being a more phonographic instrument for reading the instructions which counsel have prepared, the English judge makes his own statement of the law to the jury. The principles involved in the case are pointed out, briefly and simply, in the course of the summing up, wherever they are applicable, rather than in the form of elaborately constructed paragraphs read to the jury one after another in a tiresome and unintelligible series. Counsel are not expected to even intimate to the judge how they would like to have the jury charged.

Finally, the English are much more economical than we are, of the fruits of the trial, and always endeavor to adjust the verdict so that in case of error no new trial will be necessary. They do this wherever possible by means of special questions put to the jury, covering the actual issues litigated.

Special verdicts in the American practice are very unsatisfactory, because they are construed with the most technical severity. In the first place, they must be stated in the form of ultimate facts, and not evidence or legal conclusions, and since no one has ever been able to devise a test to identify ultimate facts, the use of a special verdict always involves a risk. Again, the formal requirements are exacting, for the questions through which the jury are brought to deal with the facts, must be clear, simple, direct, unambiguous, free from suggestive implications, and not too numerous or detailed; and the answers must meet the same tests. After fortunately escaping from the Scylla of the pleadings, one hesitates to take a chance with the Charybdis of the special verdict, and the result is that this immensely useful procedure is feared and avoided, and the parties timidly succumb to that crude relic of barbaric times, the general civil verdict.

In contrast to the usual American practice, which has made the machinery of special verdicts so intricate that it hardly functions at all, the English have developed an astonishingly simple and effective procedure. The judge himself, noting the material issues which have actually developed in the evidence, frames a few simple questions to cover them. He asks counsel on each side if they are satisfied with



them, and any reasonable changes will be made if suggested, and other appropriate questions added if desired. In a few minutes judge and counsel have agreed in open court upon the questions to be put, and neither side may thereafter complain that the questions are insufficient in substance or form or are inadequate in scope. They are put to the jury, the answers are taken, and judgment is rendered on the answers with or without argument.

The result of the English system is to make the calamity of a new trial almost unknown. The *ENGLISH REPORTS* for 1924 show only two cases sent back for new trials in the King's Bench Division during the whole year. In the same period the Supreme Court of Michigan, which I assume is typical of the United States, sent back fifty-seven cases for new trials. But the discrepancy is really much greater than this, for in England the trial courts cannot grant new trials, but application must be made by way of appeal, while in Michigan, as in most American states, new trials are ordered with great freedom by trial courts, so that the total number of new trials actually ordered in Michigan during the year 1924 might very likely have been a hundred times as great as in all of England and Wales. New trials are a total economic loss, and their frequency in the United States is the most convincing proof of the utter inadequacy of our trial procedure.

## 5. APPEALS

In the final stage of litigations, the appellate review, the English rules are clearly founded upon the simple proposition that an appeal, in its formal aspects, should involve no technical difficulties whatever. The judgment record already exists. If the papers which make it up are filed in the appellate court office, and the appellee is notified of such filing, nothing more would be essential to a perfected appeal. An appellate process reduced as nearly as possible to this degree of simplicity would be an unmixed economic advantage; for the only purpose served is the mechanical one of effecting the transfer with notice to the appellee, and every added restriction, requirement or condition merely presents an obstacle and imposes a risk. Unnecessary friction always impairs a mechanical device.

The English practice in taking an appeal so successfully meets its theoretical aim that there is almost no way of making a mistake. Nothing is required but the ability to read and to operate a typewriter. Bills of exceptions became obsolete in England so long ago that some of the oldest men now in the law court offices never heard of them. Assignments of error have also gone the way of the cross appeal, the writ of error, and the other extinct monsters of the cave-

dwelling period of English law. To perfect an appeal the English barrister serves a notice upon the respondents that he will move the Court of Appeal in fourteen days to reverse the judgment.<sup>30</sup> He then files with the clerk of the Court of Appeal three typewritten copies of the notice of appeal and of the pleadings, evidence and opinions below.<sup>31</sup> There are no abstracts, no condensations, or reductions to narrative form, to be worked out, wrangled over, and settled. The appellate record is merely a copy of existing documents. There are no exceptions. If the appeal is too late, the court can extend the time for good cause shown; if the parties change by death or otherwise, the court may order substitutions; if additional parties should be joined, the court may at any time order that they be notified; if additional evidence is needed in the Court of Appeal it may be ordered brought in, either by oral testimony or affidavit or deposition; if new points not raised below ought to be considered, the court may order or allow that this be done.

The appeal is by way of rehearing, which was defined by Sir George Jessel, Master of the Rolls, as meaning that the appeal was not to be confined to the points mentioned in the notice of appeal. Indeed, the rules do not require any grounds of appeal to be mentioned in the notice and, according to the current practice, about half the notices specify grounds and the other half do not. The case is, therefore, not reviewed for errors, but reviewed at large upon the merits, and to insure the broadest usefulness, the Court of Appeal is given all the powers of the trial court, and may draw inferences of fact and make any judgment or order that ought to have been made or make any further order that justice may require. The avowed aim is to enable the appellate court to completely dispose of the case so that when the appeal has been decided the litigation is at an end.

To an American the most remarkable thing about an English appeal is the total absence of written briefs. Everything rests upon the oral argument, and there is no time limit. The judges all participate actively in the argument, and whenever counsel makes use of any report, the usher places a copy of the same book from which counsel reads in the hands of each of the judges, so that the argument becomes a sort of round-table discussion. In this way the appeal is thoroughly canvassed by the court with the aid and in the presence of counsel, so that when the argument ends, the judges are in complete possession of all the facts and all the law. Thereupon,

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<sup>30</sup>Order 58, rule 1, rule 3. CHITTY'S KING'S BENCH FORMS, p. 611.

<sup>31</sup>THE ANNUAL PRACTICE, 1923, p. 1145.

in the ordinary case, the three judges whisper together for a moment to make sure that they are in agreement, although their views are already quite apparent from the discussion with counsel, and at once begin rendering oral opinions *serialim*, in the order of seniority. When they finish dictating their opinions they are through with the case, never to be troubled with it again, and the next appeal is called. It is rare that cases are taken under advisement. With appeals argued and decided in open court, with individual opinions expressed by each judge, there is no opportunity for the complaint so commonly made in the United States of one-man decisions in appellate courts.

Technical points of procedure are rarely urged in the Court of Appeal, because they are not favored. Only matters of substance interest the court. And it is probably because of this attitude above that technical objections are so rarely made below. In the year 1921 not a single case from the King's Bench Division was reversed for error in admitting or excluding evidence. Improper conduct on the part of counsel during the trial of a case is almost invariably corrected then and there by a caution to the jury from the judge, instead of being treated as an irrevocable error to be reached only by a new trial.

The rules of evidence and the rules of trial practice should be deemed at best only statements of judicial policy, mere guide-posts for the information of court and counsel. The excellence of the results obtained in a given case depends with no more certainty upon a literal compliance with those rules than does success in literature, sport or politics invariably depend upon the exactitude with which one follows the formal rules for writing poetry, playing golf, or running for office. Good methods are to be encouraged, but ought not to become a fetish. After all, the courts are engaged in the business of adjudicating cases, not of vindicating procedure, and every judgment which is upset merely because obtained contrary to rules, shows a failure of the courts to serve the main purpose of their existence. Such failures have been rare in England since the opening of the present century.

The Court of Criminal Appeal is a unique and interesting feature of the English judicial establishment. It sits about once a week as needed, and consists of three judges of the King's Bench Division with the Lord Chief Justice as presiding judge. Appeals can be taken either from the conviction or from the sentence. There are no formalities whatever in prosecuting the appeal. Blank forms of application for leave are placed in all the prisons, and it is the duty of the governor of every prison to furnish any prisoner with blanks

and instructions for filling them out. When completed the forms are sent to the clerk of the court where the conviction took place, and it is his duty to complete the appeal and take the proper steps to bring it on for hearing. The appeal is usually heard within four weeks after conviction. A large number of appeals are disposed of without the appearance of counsel on either side. I once heard fourteen such appeals passed upon in fifty minutes. The cases were apportioned among the three judges, and in each case one of the judges, with the papers before him, stated the facts of the case, the grounds of the appeal, and the decision of the court. One is impressed by the care with which every case is examined, and the entire freedom from technical features. No matter of form and no mistake in any procedural step is permitted to have any effect upon the prisoner's right to a hearing on the merits, and the worst that can happen is for corrections to be called for on the suggestion of the judges where they are deemed essential.

The Court of Criminal Appeal has the power, which it frequently utilizes, of calling witnesses before it or otherwise taking evidence, where the proof of some fact or further evidence upon some matter in issue on the trial is deemed necessary for the proper decision of the appeal. Thus where it appears that there was unsatisfactory evidence of identification, further evidence may be taken on the appeal as to that question, and instead of reversing the case because the evidence was weak, the Court of Criminal Appeal may affirm the conviction upon being satisfied by additional evidence that there was no question about the identity of the defendant; or it may reverse upon additional evidence which casts sufficient doubt upon the defendant's identification.<sup>32</sup> In short, the Court of Criminal Appeal need not act upon mere presumptions, as our appellate courts are so often compelled to do, but may get the facts which it needs.

In passing upon appeals from sentence, which are very common, the court exercises a directly supervisory power, with the avowed purpose of standardizing sentences as far as possible so as to eliminate the effect of the personal equations of the trial judges. Its policy is very emphatically in favor of sentences which seem very light to Americans who are accustomed to the terrific penalties with which we punish the few criminals who are finally convicted, as if in that way to make up for the many who escape. Criminal statistics for 1922 show that among 482 sentences to penal servitude, there was only 1 for 15 years, 7 for 10 years, and 1 for 8 years, and that 70 per cent of them were for only three years; and that among 46,377

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<sup>32</sup>Jones Cas. 2 Cr. App. 102.



sentences to imprisonment, there were only two for more than two years. Swift and certain proceedings with light sentences seem to be a much better deterrent than slow and doubtful proceedings with heavy sentences as remote possibilities.

Finally, it is considered of great importance that the judges of the Court of Criminal Appeal shall be frequently engaged, at the assizes or in the Central Criminal Court, with the trial of criminal cases, so that in dealing with the problems presented on appeal they may have the benefit of their own contemporary experience in the trial court room.<sup>33</sup>

The English system of procedure has been largely adopted in all the British colonies, so that the administration of justice is now enjoying high popular credit in every part of the English-speaking world except the United States. It is quite time that this country should seriously set about a thorough re-examination of the problems of judicial administration, with a view to emancipating it from the inherited traditions which have almost destroyed its vitality and power.

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<sup>33</sup>See testimony of Lord Alverstone, Chief Justice, at page 20, and of Justice Channell, at page 108, of the Report of the Select Committee of 1909 to Investigate the King's Bench Division, Minutes of Evidence.

## REMEDY OF THE SELLER FOR BREACH OF CONDITIONAL SALE IN TEXAS

A discussion of this subject necessarily presupposes that we have fixed definitely in mind what we mean when we say "conditional sale." This term has acquired two meanings.

(1) A sale of goods with reservation of title.

(2) A sale of goods with an option in the vendor to buy back upon the happening of a certain condition or event.

In the ordinary use of the term the first of these is meant. That is, the payment of the price is made an express condition precedent to the passage of title. It is contended by some, however, that this is not a true conditional sale and that the term should be restricted to use in the second sense above.<sup>1</sup> In such a case the condition takes the form of a condition subsequent giving the vendor the right, upon the happening of the condition, to revest title in himself. Williston says that a conditional sale on condition precedent is not simply a contract right but that the vendee, in addition to the contract right, also acquires a property right. He adds: "The situation is, therefore, identical with the case of the condition subsequent, except that in the case of the condition precedent the seller has a bare legal title for the purpose of security only, while in the case of a condition subsequent the seller has only the right to regain the legal title on the happening of a condition. As the purpose of the seller's right, whether a legal title or a right to resume the title on breach of condition, is merely to give security for the payment of the price, the transaction is, in its essence, a mortgage."<sup>2</sup>

Statutes providing for the recording of chattel mortgages are not, however, generally held to cover conditional sales.<sup>3</sup> But in Texas it is specially provided by statute that all reservations of the title to or property in, chattels, as security for the purchase money thereof, shall be held to be chattel mortgages, and shall, when possession is delivered to the vendee, be void as to creditors and bona fide purchasers, unless such reservation shall be in writing and registered as required of chattel mortgages.<sup>4</sup>

Where, in conditional sales, there is a provision for forfeiture in case the buyer fails to pay the full price, it is generally enforced, but in the law of mortgages though there is such a provision, it is

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<sup>1</sup>In this regard see *MECHEM, SALES*, Secs. 559 et seq.

<sup>2</sup>*WILLISTON, SALES*, 2nd Ed., Sec. 330.

<sup>3</sup>*WILLISTON, SALES*, 2nd Ed., Sec. 337.

<sup>4</sup>*LAWS OF TEXAS* 1885, p. 76, *REV. CIV. STAT.* 1925, Art. 5489.

not enforced. This difference, Williston says, is probably due to the fact that courts of equity have established the fundamental principles of the law of mortgages, whereas, the rights of the parties in conditional sales have usually been determined at law.<sup>5</sup>

This brings us to the direct point of discussion in this article. In future we shall leave out of consideration the meaning of the term "conditional sale" as referred to in the second sense above and will consider alone the situation where there is a sale with reservation of title where the vendee has failed, either partially or completely, to pay the purchase price. In such a case has the vendor the right to rescind the contract of sale and take back his goods, or must he, in Texas, treat the transaction as a mortgage and recover only for the interest which he retains in the goods?

The earlier cases on the subject of conditional sales, decided before the passage of our present statute,<sup>6</sup> hold almost uniformly that where there has been such reservation of title the creditors or a subsequent purchaser of the original vendee, acquire no rights in the property as against the original vendor.

In *Cobb v. Tufts*,<sup>7</sup> Tufts sold Cobb a soda fountain, taking Cobb's notes for the purchase price. In the notes it was expressly stipulated that title to the property remained in Tufts and did not vest in Cobb until the notes were paid. The property was delivered to Cobb, and, without fault on his part, was destroyed by fire. In a suit by Tufts upon the notes Cobb pleaded the destruction of the property as above stated, and it was held on general exception to the plea that it was a good plea of failure of consideration. The case evidently holds that the whole title remains in the vendor and no "special property" whatever passes to the vendee until full payment when the whole property right must pass to him. The opinion is to be criticised on the ground that it placed upon Tufts the burden of a risk of a loss which he is not in a position to prevent and a risk which we can hardly believe was in the contemplation of the parties that he should assume. This case represents the minority holding in the United States.<sup>8</sup>

But in the same year Judge Hurt expressed the opinion that a note reserving title was a mortgage.<sup>9</sup> And in *Tufts v. Blanton*,<sup>10</sup> it was held that such a sale comes within the operation of our registration

<sup>5</sup>See WILLISTON, SALES, 2nd Ed., Sec. 579.

<sup>6</sup>*Supra*, note 4.

<sup>7</sup>2 WHITE & WILLSON, Sec. 154 (1884).

<sup>8</sup>WILLISTON, SALES, 2nd Ed., Sec. 304.

<sup>9</sup>*Ascue & Henchman v. C. Aultman & Co.*, 2 WHITE & WILLSON, Sec. 497 at page 444 (1884).

<sup>10</sup>2 WHITE & WILLSON, Sec. 294 (1884).

statutes (as to chattel mortgages) and that a bona fide purchaser of the property for a valuable consideration without notice of the original vendor's title, takes a good title against the original vendor. In this regard the case follows *Knittel v. Cushing*,<sup>11</sup> in which the court says:

The price and terms of payment were agreed upon, and the possession delivered to Mrs. Newhard. The remainder of the purchase money was sought to be secured, not by a recorded lien under our statute provided for that purpose, but through the pretended contract of renting. Conceding that, as between the original parties, the contract would be binding, yet it would be contrary to the policy of our registration laws to hold that it would be binding also upon the defendant Knittel, who is admitted to be a purchaser for value without notice.

These two cases, contrary to the general rule as announced above, would make these conditional sales subject to the operation of our chattel mortgage registration statutes. These cases are, however, overruled by *City National Bank v. Tufts*,<sup>12</sup> which holds that title remains in the vendor and that the creditors of the vendee acquire no rights in the property. This follows the doctrine announced by *Cobb v. Tufts*,<sup>13</sup> and seems to be the law as set forth by the majority of the cases prior to the passage of our statute on conditional sales.<sup>14</sup>

In *Merchants and Planters Bank v. J. H. Thomas*,<sup>15</sup> it was held that where there was such reservation of title upon failure of the vendee to pay the notes given for the property the vendor could either sue on the notes or rescind the contract and sue for the goods in specie. It is there said:

To resume possession of the property was to cancel the debt for its purchase money; on the other hand, to enforce this debt was to admit the title to the property to be in the vendee, for the vendees could not be made to pay the entire purchase money of the property without at the same time having their vendor's title vested in them.

This is the first case decided, following the passage of our conditional sales statute, pointing out the remedy of the seller in case of breach of the conditional sale agreement. It is interesting as furnishing an indication of the attitude of the court at that time. It is to be noted that it leaves the question of the property rights somewhat undecided.

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<sup>11</sup>57 Tex. 354 (1882).

<sup>12</sup>63 Tex. 113, 5 TEXAS LAW REVIEW 96 (1885).

<sup>13</sup>Note 7, *supra*.

<sup>14</sup>*Leath v. Uttley*, 66 Tex. 82 (1886).

<sup>15</sup>69 Tex. 237 (1887).



The vendor by suing for the property is to be allowed to claim the property right in himself but in suing on the notes given therefor he surrenders his right and thereby is treated as passing to the vendee some additional property right. It would seem that the question of property rights in the goods should have been settled before there was some breach of the agreement of sale. Why is not this problem treated as though the property rights of the parties were settled by the agreement itself? This would seem the logical time for such matters to be adjusted. Again the court asserts:

for the vendees could not be made to pay the *entire* (italics ours) purchase money of the property without at the same time having their vendor's title vested in them.

It is not difficult to appreciate the truth of this statement. The danger lies in the implication that where the vendee has not paid the entire purchase price the vendor can retake the goods and forfeit the portion of the consideration paid to him by the vendee. In other words, the court seems still to regard the whole property right as remaining in the vendor until the entire consideration is paid by the vendee. This, however, is dictum, the vendee having paid no part of the consideration in the case under discussion.

Yet the matter was again passed upon by the Supreme Court in 1890 in the case of *Campbell Printing Press and Mfg. Co. v. Powell*,<sup>16</sup> and the same view is adopted. Here the court per Stayton, C. J., says:

Appellant was and still is the legal owner of the property, title thereto never having passed to Powell though possession did; and *as against appellees* (italics ours), appellant should be entitled to rescind the sale and to maintain an action for recovery of the property itself . . . but the property in this case was not delivered with intent to pass the title, but rather as a bailment, by the express terms of the contract title remaining in appellant, who expressly agreed to make title only when the purchase money was paid.

The court seems to cling tenaciously to the theory of an absolute reservation of title, but we cannot but believe that Judge Stayton at that time was beginning to see the true nature of the situation, for when it comes to indicating the remedy of the appellant, he says:

. . . it would have been its (appellant's) right, on failure of Powell to comply with his contract, to resell the property contracted to be sold, and to apply the proceeds to the payment of the sum contracted to be paid, and for any balance to have had

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<sup>16</sup>78 Tex. 53, 14 S. W. 245 (1890).

a judgment against Powell. We are of the opinion that the delivery of the property, under the circumstances, ought not to be held such a delivery as would defeat the right of appellant to have it sold *through a decree of court* (italics ours), and the proceeds applied to satisfaction as far as that will go to the sum due by Powell.

The case of *Bensinger v. Self-Adding Cash Register Co.*,<sup>17</sup> where the plaintiff sold and delivered chattels under a contract providing that the title should not pass until the agreed price was paid, stresses again the right of the vendor to treat the title to the goods as remaining in himself and sue for their possession or to assert that title has passed to the vendee and sue him upon the debt thereby created. The court forcibly expressed itself as follows:

The assertion of either right is the abandonment of the other. To resume possession cancels the right to enforce payment of the obligation to pay and an effort to enforce payment is equivalent to an admission of title in the purchaser.

In the year 1894 the case of *Parlin & Orendorff Co. v. Harrell*<sup>18</sup> was decided. This was a case of a conditional sale which was not registered in accordance with our statute, Article 3190a (now Article 5489, REV. CIV. STAT. 1925), providing that such sales shall be registered as chattel mortgages, and which reservation of title was held not good as against lien creditors. But the dicta of the court to the effect that upon non-payment of the notes the vendor's remedy is by suit for possession rather than foreclosure and sale is the chief point of interest in the case. The court says:

Such an instrument is to be treated as a mortgage, in the sense that it must be registered as a chattel mortgage to be valid as against purchasers in good faith and creditors. . . . The nature of the contract was not changed by the statute. The parties could contract in reference to the title and declare who should own and hold it. It was not the purpose of the statute to deprive them of the right to so contract. If the contrary be true, plaintiff could not maintain this action for the possession of the property. In such a case it would be merely a mortgagee out of possession, and could become entitled to possession only by foreclosure and sale.

The court then points out that the rights of the parties as creditors and purchasers are affected by registration or failure to register as a

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<sup>174</sup> WHITE & WILLSON, Sec. 289, 18 S. W. 136 (1892).

<sup>188</sup> Tex. Civ. App. 368, 27 S. W. 1084 (1894).

chattel mortgage, but that the nature of the contract itself is not changed thereby, and adds:

By the contract of sale, plaintiff did not surrender title to the goods, and therefore can sue for possession; but it could not recover against a creditor or bona fide purchaser, as the contract was not registered as a chattel mortgage.

The opinion of the court seems headed in the right direction, but it stops before it reaches the logical result. By what right does the court assume that the similarity to a chattel mortgage stops with mere registration? Does not the character of a chattel mortgage attach, under the statute, to the transaction and the mortgagee's remedy thereafter become that of foreclosure and sale? Since the sale is to be registered as a chattel mortgage it would seem that a more just and a more logical result would be reached by carrying the analogy to the logical conclusion that the remedy of the seller lies in his character as a mortgagee.<sup>19</sup>

In *Harrold v. Barwise*,<sup>20</sup> it was held that a verbal reservation by the vendor of the title to goods, sold and delivered as security for the purchase money, is void because a verbal mortgage is not good in this state.<sup>21</sup>

It has been held that an unrecorded reservation of title is void as to creditors and that it was unimportant whether they had notice of it or not since it required registration to give the instrument effect as to them.<sup>22</sup> This doctrine is advanced by the courts on interpretation of the peculiar wording of the statute and they hold that the legislature has thereby shown its intention that good faith shall be required only of purchasers, mortgagees, etc., of the original mortgagor.<sup>23</sup> The law at present seems well settled that a reservation of title is void as to lien creditors where not recorded under the provisions of Article 5489, whether they have knowledge of such reservation of title or not. Some distinction might be drawn between a case where the creditor or purchaser had full knowledge before involving himself in any transaction

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<sup>19</sup>In this connection see also *Parlin & Orendorff Co. v. Moline Plow Co.*, 27 S. W. 1087 (Tex. Civ. App., 1894). For a discussion of the doctrine that election to sue on the notes renders the contract absolute see *Merchant's & Planter's Bank v. J. H. Thomas and Bensinger v. Self-Adding Cash Register Co.*, cited and discussed above, and 13 A. L. R. 1044n; 37 L. R. A. (N. S.) 72n; *In re Sutton*, 244 Fed. 872 (1917).

<sup>20</sup>30 S. W. 498 (Tex. Civ. App., 1895).

<sup>21</sup>Citing *Lazarus v. Bank*, 72 Tex. 354, 10 S. W. 252 (1888).

<sup>22</sup>*Hoyt & Bros. Co. v. Weiss Bros.*, 10 Tex. Civ. App. 462, 32 S. W. 86 (1895).

<sup>23</sup>*Brothers v. Mundell, Munzesheimer & Co.*, 60 Tex. 240 (1883).

and a case where he did not learn of the reservation of title until the debt had already been incurred. In the case of subsequent purchasers it has been held that in order to be bona fide they must be without notice.<sup>24</sup> And the word "creditors" in this statute means creditors who have acquired some character of lien upon the property.<sup>25</sup> But it is not necessary that this lien be acquired by some process of law,<sup>26</sup> so long as the claim be charged by law as a specific lien upon certain property.<sup>27</sup> A full discussion of the authorities on this matter would be out of the scope of this article.<sup>28</sup>

On rehearing, after the case of *Harling v. Creech*<sup>29</sup> had been decided, the court in the Hoyt case said:

Whether or not the appellant's reservation of title would be void as to a junior lien we need not further consider, because the Supreme Court has held that there can be no reservation of title even between the original parties, and that an instrument attempting to reserve title could be no more than a chattel mortgage.

But in the case of *Harling v. Creech* we have the typical case of a sale with reservation of title and power to go in and take upon failure to pay any installment of the purchase price when due. Here one of the two notes was paid and the other was not paid at maturity and the vendor entered and retook the property, a sewing machine. The court says:

The language "all reservations of title to or property in chattels as a security for the purchase money thereof, shall be held to be chattel mortgages," is plain and admits of no other construction. Whenever the transaction assumes that shape, the law gives it the character of a chattel mortgage between the parties, as well as to all other persons. The law does not say that the instrument shall be as to creditors and bona fide purchasers, a chattel mortgage but, being a mortgage, it is to be held "void as to creditors and bona fide purchasers unless in writing and recorded as chattel mortgages" are required to be. If it is not a mortgage as between the parties, then there is no language in the

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<sup>24</sup>*Brothers v. Mundell, Munzesheimer & Co.*, 60 Tex. 240 (1883); *Berkey & Gay Furniture Company v. Sherman Hotel Co.*, 81 Tex. 135 (1891).

<sup>25</sup>*Overstreet v. Manning*, 67 Tex. 657 (1887).

<sup>26</sup>*Berkey & Gay Furniture Co. v. Sherman Hotel Co.*, *supra*.

<sup>27</sup>*Bowen v. Lansing Wagon Works*, 91 Tex. 385, 43 S. W. 872 (1898).

<sup>28</sup>But in this connection see: *Brothers v. Mundell, Munzesheimer & Co.*, *supra*; *Overstreet v. Manning*, *supra*; *Berkey & Gay Furniture Co. v. Sherman Hotel Co.*, *supra*; *Parlin & Orendorff Co. v. Harrell*, 27 S. W. 1084 (Tex. Civ. App., 1894); *Hoyt & Bro. v. Weiss Bros.*, *supra*; *Lewis v. Bell*, 40 S. W. 747 (Tex. Civ. App., 1897); *Bowen v. Lansing Wagon Works*, *supra*.

<sup>29</sup>88 Tex. 300 (1895).



law which would make it a mortgage as to creditors and purchasers, for its character as to creditors and purchasers depends, under the statute, upon the character it had at its execution. . . . Registration was required in order to protect creditors and bona fide purchasers of the property. . . .

But suppose that the creditor did not deserve protection since he was all along cognizant of the fact that title to the property had been reserved by the vendor? Under such circumstances would it not be more equitable if the character of a mortgage were reserved throughout the transaction and the creditor forced to recognize the prior interest of the vendor? In continuing the court recognizes the essential characteristics of the transaction as a mortgage, and asserts:

The instruments, being chattel mortgages, the vendor had the rights of a mortgagee under a chattel mortgage containing the stipulations of right to take possession, which would be to take possession of the property if he deemed himself insecure, or, the debt not being paid, and to hold or dispose of the property in the character of mortgagee and not as owner.

Here the court has carried the doctrine to its logical conclusion and has arrived at the correct result so far as the remedy of the vendor in such contracts is concerned.<sup>30</sup>

But in 1898 in the case of *Bowen v. Lansing Wagon Works*,<sup>31</sup> the Supreme Court in an opinion rendered by Judge Denman, held that a transaction in which title was reserved pending the payment of certain notes made for the entire purchase price, is "a reservation by the vendor and not any form of lien attempted to be given by the owner" within the purview of Article 3970, REV. CIV. STAT. 1911 (now Article 4000, REV. CIV. STAT. 1925), providing that an attempted chattel mortgage on goods daily exposed for sale shall be fraudulent and void. The opinion does not stand for the proposition that a conditional sale is not a chattel mortgage, but rather that it is not such a mortgage or lien as is by Article 3970 made fraudulent and void and it should be so limited. This distinction is more clearly brought out in later cases.<sup>32</sup>

In *Hallenburg Music Co. v. Morris*<sup>33</sup> the court asserts:

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<sup>30</sup>This decision is quoted with approval in the case of *Parlin & Orendorff Co. v. Davis' Estate*, 74 S. W. 951 (Tex. Civ. App., 1903).

<sup>31</sup>*Supra*, note 27.

<sup>32</sup>*Hall v. Keating Implement Co.*, 77 S. W. 1054 (Tex. Civ. App., 1903); *Mayfield Co. v. Harlan*, 184 S. W. 313 (Tex. Civ. App., 1916); *In re Varner*, 297 Fed. 337 (1924).

<sup>33</sup>5 S. W. 396 (Tex. Civ. App., 1896).

. . . Plaintiff could proceed by foreclosure on the piano for the balance due, and was not confined, if it were permissible under the facts of this case, to a judgment for the specific property.

It is to be noted that this case was decided without reference to our statute since the contract was concluded without the borders of the state and was not registered under the provisions of our law. It is relevant particularly as seeming to express a doubt on the part of the court as to whether a suit for possession under the circumstances would be proper and pointing to foreclosure of the lien as in a mortgage, as the preferable remedy.

And in *Loftus v. King*,<sup>34</sup> the Court of Civil Appeals in Galveston, in discussing a "conditional contract of sale" giving to the vendor in case of failure to pay an installment of the purchase price, the right to take back the property and treat the money thus far paid as rent, says:

Neither he (Loftus) or the furniture company had treated the sale as conditional, nor sought to forfeit the previous payments, and take possession of the property. Appellant could treat the contract as a chattel mortgage, and foreclose a lien for the purchase money, due and unpaid.

Here the court speaks of "conditional sale" in the second sense in which we have utilized it above and speaks of forfeiting the previous payments. But without asserting its opinion on the validity of such action, the court gives the vendor the right to treat the contract as a chattel mortgage and foreclosure thereon.

And in a short time similar facts forced a court to take steps, even though indirect ones, in support of the true doctrine. This was in the case of *Jaeggli & Martin v. Phears*,<sup>35</sup> in which suit was brought seeking recovery of the purchase price of two gravestones. The contract provided that the stones should be paid for on delivery or with 10 per cent interest after tender of delivery until paid. It was specifically agreed that title should remain in the plaintiffs until the debt was paid in full. The defendant's contention was that there was only an executory contract of sale on account of this reservation of title, and that the only remedy available was an action for damages. But the court did not take this view of the matter and allowed a recovery of the full contract price, saying in its opinion:

This reservation of title was manifestly made for the purpose of securing the payment of the contract price and yet, under ap-

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<sup>34</sup>56 S. W. 109 (Tex. Civ. App., 1900).

<sup>35</sup>70 S. W. 330 (Tex. Civ. App., 1902).

pellee's contention, its effect is to defeat plaintiff's right to recover the contract price.

It may be that the court saw justice in this matter and then found a way to mete it out, but whatever may have been its method of approach, in that short sentence it expressed the gist of this whole subject. The arrangement aims at protection; the state of the pure legal title is subsidiary and should be so considered so long as the interest of the seller is protected as it appears.

*Singer Mfg. Co. v. Rios*<sup>36</sup> is a suit for damages for a trespass in taking from the plaintiff a sewing machine which he was buying on the installment plan under an agreement providing that the defendant company, which retained a mortgage on the machine, could take possession thereof either with or without process of law, upon failure to meet any installment. The court says:

Freedom of contract is the rule subject to the exception that a party cannot bind himself to do that which is by law prohibited or declared to be illegal, or which is manifestly detrimental to the public morals or the public good.

And it adds:

The proposition that such a stipulation is valid and that the mortgagee may take peaceable possession of the property, without the consent, and even over the protest of the mortgagor, is sustained by the great weight of authority.

This case, taken in conjunction with the case of *Harling v. Creech*, seems to advocate the sounder and better rule.<sup>37</sup>

In the case of *Thos. Goggan & Bros. v. Garner*,<sup>38</sup> the suit is one for conversion by the purchaser against the vendor of a piano sold under an agreement that if the purchaser defaulted in any of the installments due thereon, the vendors should have the right to take back the piano. An instruction to the jury that if they found for the plaintiff they should give him the reasonable market value of the piano at the time of conversion, was held error in view of the fact that the purchaser still owed \$40.00 thereon. The decision is certainly correct but leads to the observation that, since in this case the purchaser is only to be allowed to recover to the extent of his interest (the only course which the court could have adopted), it is only right that when the situation is reversed, the vendor should be allowed only the same recovery.

<sup>36</sup>96 Tex. 174, 71 S. W. 275 (1903).

<sup>37</sup>Henderson v. Mahoney, 72 S. W. 1019, 31 Tex. Civ. App. 539 (1903).

<sup>38</sup>119 S. W. 341 (Tex. Civ. App., 1909).

*Robertson v. Withers*<sup>39</sup> holds that where a seller retaining title until the price is paid, with the right of resuming possession on the buyer's failure to pay any of the installments at maturity, assumes control of the goods and rents them to third persons before default in the payment of any installment of the price, his act is a conversion unless the buyer authorizes it. This case would seem to indicate that the seller retains only a bare legal title which, of itself, does not give him the right of possession. But even more noteworthy is the converse of the proposition; that the vendee acquires a special property. This follows the suggestion of Williston as noted above.

The later cases seem, without exception, to follow the rule laid down by *Harling v. Creech* and the *Robertson Case*. These cases recognize that the relation of the parties under such a contract is that of mortgagor and mortgagee and hold that something more than a mere contract right passes to the vendee by reason of the contract. They give to the vendor in such a contract the remedies of a mortgagee.

In *Crenshaw v. Staples*,<sup>40</sup> the plaintiff sold the defendant some machinery, reserving title as security for the purchase price, and the defendant was to pay for it at the rate of \$25.00 a month. The defendant having paid nothing, the plaintiff brought suit for the property and asked also its rental value for the time used. The court, in its opinion, says:

Under Article 5654 of the Revised Civil Statutes of 1911, contracts of this character are defined as chattel mortgages. Treating the transaction as a sale, and the parties as mortgagor and mortgagee, the measure of the mortgagor's liability was the amount of his debt, \$410, and the accrued legal interest, at the time of the trial, and not the market value of the property.

And the court denied the plaintiff his claim for rent. The noteworthy point in the case is the manner in which the court treats the question of property in the machinery. While it treats the legal title as remaining in the vendor, it states that

The evidence clearly shows that the physical possession of the property was delivered to Crenshaw; that he had the right to use and operate it and to appropriate all the revenues and benefits arising therefrom to his own use; that he had obligated himself to pay a fixed sum as the purchase price with the understanding that after the payment of that sum the property was to be his absolutely.

How different from the decision in *Cobb v. Tufts*! The court then

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<sup>39</sup>152 S. W. 1160 (Tex. Civ. App., 1913).

<sup>40</sup>173 S. W. 1184 (Tex. Civ. App., 1915).



would seem to indicate that aside from the empty legal title it considered that all the elements of ownership, including that of beneficial user, are in the vendee under such an agreement.<sup>41</sup>

There remains only one other case for discussion. The case of *Black et al. v. Southern Film Service, Inc.*,<sup>42</sup> in which the Galveston Court of Civil Appeals held that where a seller seeks to recover title and possession of picture machines sold under a conditional sale agreement he cannot get a recovery of the machines and keep also the purchase price paid. This decision reverses the judgment of the county court of Harris County and does not decide the question of remedy beyond the question of the error involved. But it is reasonable to believe that the court intended to follow the path marked out by recent decisions.

The law, then, at present seems fairly well settled to the effect that under the usual conditional sale contract the vendor becomes a mortgagee and his remedy under the statute for breach of such contract is that of a mortgagee out of possession. It is submitted that this is the correct and logical conclusion, that it tends to effectuate the agreement of the parties as they intended that it should operate; in short, that under such a doctrine substantial justice is done as between the contesting parties; and, finally, that those few cases which have indicated a contrary view have wandered from the basic spirit and intent of such agreements and should not be followed. It is to be hoped that when the question again reaches the Supreme Court it will hand down a decision which will definitely establish these sales with reservation of title as mortgages and give to the Bar of this state a discussion of the status of the property rights involved which will sweep away the debris accumulated through the years of legal stresses and strains accompanying the gradual changes in the legal conception of the rights arising from such transactions.

J. P. Adoue.

Houston.

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<sup>41</sup>See also *Willys-Overland Co. v. Chapman*, 206 S. W. 978 (Tex. Civ. App., 1918), and *Menke v. First National Bank*, 206 S. W. 693 (Tex. Civ. App., 1918), where, among other things, the effect of failure to record such reservation of title under Article 5489 is also discussed. The case of *Chambers et al. v. Consolidated Garage Co.*, 210 S. W. 565 (Tex. Civ. App., 1919), affirmed 111 Tex. 293, 231 S. W. 1072 (1921), differs in no material respect from *Willys-Overland Co. v. Chapman*, above, and follows it.

<sup>42</sup>12 S. W. 295 (Tex. Civ. App., 1919).

## TORT JURISDICTION IN ADMIRALTY

Since the adoption of the Constitution ample opportunities have been presented for the interpretation and construction of Article III, Section 1, which provides that the judicial power of the United States shall extend "to all cases of admiralty and maritime jurisdiction." As a result the general limits of admiralty jurisdiction have been more or less definitely fixed from time to time by the Supreme Court in the expression of general principles in certain decisions which stand out as leading cases. In spite of early decisions limiting the waters included to those affected by the ebb and flow of the tide,<sup>1</sup> beginning with *The Genesee Chief*<sup>2</sup> and *Hine v. Trevor*,<sup>3</sup> jurisdiction was extended to the Great Lakes, the Mississippi River and ultimately to all inland bodies of water capable of use as highways of interstate or foreign water-borne commerce.<sup>4</sup> In *The Plymouth*,<sup>5</sup> it was held that jurisdiction in tort depends on locality, namely, that "the wrong and injury complained of must have been committed wholly upon the high seas or navigable waters, or at least, the substance and consummation of the same must have taken place upon these waters." It was also stated that "every species of tort, however occurring, and whether on board a vessel or not, if upon the high seas or navigable waters, is of admiralty cognizance." On the other hand, in *Insurance Co. v. Dunham*,<sup>6</sup> the Supreme Court held that the test for jurisdiction in contract is the nature of the subject matter. The general principles to be deduced from these cases would

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<sup>1</sup>Thomas Jefferson, 10 WHEAT. 428, 6 L. Ed. 358 (1825); *Peyroux v. Howard*, 7 Pet. 342, 8 L. Ed. 700 (1833). Cf. *Waring v. Clarke*, 5 How. 441, 12 L. Ed. 226 (1847).

<sup>2</sup>12 How. 443, 13 L. Ed. 1058 (1851).

<sup>3</sup>4 WALL. 555, 18 L. Ed. 451 (1866).

<sup>4</sup>In *Ex parte Boyer*, 109 U. S. 629, 27 L. Ed. 1056, 3 Sup. Ct. 434 (1883), jurisdiction of a collision on an artificial canal was upheld. See also *Robert W. Parsons*, 191 U. S. 17, 48 L. Ed. 73, 24 Sup. Ct. 8 (1903). In the *Daniel Ball*, 10 WALL. 557, 19 L. Ed. 999 (1870), it was stated that waters to be public navigable waters must be navigable in fact and that "they are navigable in fact when they are used in their ordinary condition, as highways for commerce over which trade and travel are or may be conducted in the customary modes of trade and travel on water." It was also stated that they constitute navigable waters of the United States "when they form in their ordinary condition by themselves, or by uniting with other waters, a continued highway over which commerce is or may be carried on with other states or foreign countries in the customary modes in which such commerce is conducted by water."

<sup>5</sup>3 WALL. 20, 18 L. Ed. 125 (1865).

<sup>6</sup>11 WALL. 1, 20 L. Ed. 90 (1871).

seem then to be that torts consummated upon, and contracts relating to the commerce and navigation of, navigable waters and the high seas are within admiralty cognizance.

But are the general principles laid down in the cases just referred to still controlling? Or, have they been annulled or qualified in other decisions? As already stated *The Plymouth* definitely announced locality as the sole test for jurisdiction in tort. However, subsequent decisions, usually in the language employed, but at times in the results reached, have laid a basis for expression of doubt as to whether locality is an unfailing criterion. The cases in which the test has been questioned might be divided into two classes: first, those in which it has been suggested that locality is not always the test; second, those in which it has been suggested that while the locality test must be satisfied other circumstances must exist in addition for the tort to be of admiralty cognizance. Before going into an examination of these cases it might be well to consider some of the results reached in the application of the test to certain fact situations.

In *The Plymouth*,<sup>7</sup> fire originating on board a vessel lying alongside a wharf was communicated to the shore, doing damage to buildings there. Since the damage occurred on shore the tort was held to be a land and not a maritime wrong. The same has been held to be true of injuries to persons on shore received as the result of the negligent handling of a ship's appliances.<sup>8</sup> Likewise injuries by vessels to bridge piers or other fixed structures, used in connection with land, have been held to give rise to common law and not maritime causes of action.<sup>9</sup> On the other hand, injuries to passengers, or others, on board ship have been treated as maritime.<sup>10</sup> The same is true of injuries to ships by obstructions to navigation.<sup>11</sup> In these latter cases the torts having been consummated on navigable waters have for that reason been held to be within admiralty cognizance. It should be noted that in the cases given the nature of the instrumentality through which the injury was received was immaterial. In those involving damage to land structures the fact that injury was

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<sup>7</sup>Note 5. See also *Ex parte Phoenix Ins. Co.*, 118 U. S. 610, 30 L. Ed. 274, 7 Sup. Ct. 25 (1886).

<sup>8</sup>*Mary Stewart*, 10 Fed. 137 (1881). See also *The Bee*, 216 Fed. 709 (1914).

<sup>9</sup>*Cleveland T. & V. R. Co. v. Cleveland S. S. Co.*, 208 U. S. 316, 52 L. Ed. 508, 28 Sup. Ct. 414 (1907).

<sup>10</sup>*Leathers v. Blessing*, 105 U. S. 626, 26 L. Ed. 1192 (1881); *Herman v. Port Blakely Mill Co.*, 69 Fed. 646 (1895).

<sup>11</sup>*Atlee v. Northwestern Union Packet Co.*, 21 WALL. 389, 22 L. Ed. 619 (1874).

caused by a ship, an instrument of maritime commerce, did not confer jurisdiction.

In *The Blackheath*,<sup>12</sup> a vessel negligently collided with and injured a detached beacon marking the channel of Mobile Bay, the beacon, though attached to the bottom of the bay, being entirely surrounded by water. The Supreme Court held the tort to be maritime, and in an opinion delivered by Mr. Justice Holmes adopted language which seemed, at least, to qualify, if not overrule, the doctrine of *The Plymouth*. It was made clear, however, that the court was dealing "with an injury to a government aid to navigation . . . injured by the motion of a vessel, by a continuous act, beginning and consummated upon navigable water, and giving character to the effects upon a point which is only technically land, through a connection at the bottom of the sea."<sup>13</sup> On the other hand, Mr. Justice Brown, in a concurring opinion, definitely accepted the decision "as practically overruling the former ones and as recognizing the principle declared by the English Admiralty Court Jurisdiction Act of 1861 (7), extending the jurisdiction of the English Admiralty to 'any claim for damages by any ship.'"<sup>14</sup> While this latter view would not necessarily exclude from admiralty cognizance torts consummated on maritime waters, its operation would bring within the field of maritime torts wrongs consummated on land, and hence under the locality test non-maritime, when the instrumentality through which the tort is committed is a ship. But Mr. Justice Brown's estimate of *The Blackheath* has not been given the effect contended for. Within a few years it was held by the Supreme Court that admiralty jurisdiction does not include injuries by ships to bridge piers and wharves.<sup>15</sup> Subsequently in *The Raithmoor*,<sup>16</sup> in which the Supreme Court upheld jurisdiction of an injury by a ship to a detached structure in the course of construction and intended for a navigation beacon on completion, Mr. Justice Hughes distinguished the facts of the case then before the court, as well as those in *The Blackheath*, from the facts in cases in which jurisdiction of injuries to land structures, though by ships, had been denied, by pointing out that in the former the injuries were to structures which because of their locality and design were maritime, while in the latter the damage was to

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<sup>12</sup>195 U. S. 361, 49 L. Ed. 236, 25 Sup. Ct. 46 (1904).

<sup>13</sup>195 U. S. 361, 366, note 12 *supra*.

<sup>14</sup>195 U. S. 361, 366.

<sup>15</sup>Cleveland T. & V. R. Co. v. Cleveland S. S. Co., note 9, *supra*. See also *Martin v. West*, 222 U. S. 191, 56 L. Ed. 159, 32 Sup. Ct. 42, 56 L. R. A. (N. S.) 592 (1911).

<sup>16</sup>241 U. S. 166, 60 L. Ed. 937, 36 Sup. Ct. 514 (1915).



structures which because of their connection with the shore through physical attachment had their locality on land. In a comparatively recent case<sup>17</sup> it was contended on the basis of *The Blackheath* and *The Raithmoor* that injury by a ship to a spur dike extending from the bank of the Mississippi and intended to improve the channel was within maritime cognizance being an injury to an aid to navigation. But the Supreme Court denied jurisdiction. The net result of the cases involving injuries to aids to navigation is that admiralty has jurisdiction, not when the injury is to an aid to navigation, nor when it is done by a ship, but more particularly when the injury is to an aid to navigation which because of its locality and design is maritime. This in no sense introduces a new test for tort jurisdiction. On the contrary, it leaves the locality test unimpaired.

But while it may be safely asserted that the decisions upholding jurisdiction of injuries by ships to beacons do not substitute a new rule for the locality test, can it be said with an equal degree of certainty that if the locality of the tort is maritime it follows that the wrong is maritime? Or, has the locality test been qualified so as to permit jurisdiction only, if in addition the wrong has some connection with maritime commerce or navigation? If this is true, for the tort to be maritime, it would be necessary that it come within the terms of both the locality test of *The Plymouth*<sup>18</sup> and the test for jurisdiction in contract laid down in *Insurance Co. v. Dunham*.<sup>19</sup> Is there any basis for narrowing the test for tort jurisdiction by thus adding to the locality test that applied in determining contract jurisdiction? The question has arisen particularly in libels brought by longshoremen against their employers to recover for injuries sustained on board a ship while engaged in loading or unloading. It has been held by a Federal court that such a suit is not within admiralty cognizance on the ground that the service rendered by a longshoreman is non-maritime, having no direct connection with maritime commerce or navigation.<sup>20</sup> The point was also raised in a similar case before the Supreme Court,<sup>21</sup> while it was intimated that locality is the only test, the solution of the real problem, namely, that of deter-

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<sup>17</sup>U. S. v. Panoil, 266 U. S. 433, 69 L. Ed. 188, 45 Sup. Ct. 164 (1925). Cf. *Doullut & Williams Co. v. United States*, 69 L. Ed. 498, 45 Sup. Ct. 411 (1925), in which jurisdiction was taken under circumstances similar to those of *The Blackheath*, note 12, *supra*.

<sup>18</sup>Note 5, *supra*.

<sup>19</sup>Note 6, *supra*.

<sup>20</sup>*Campbell v. H. Hackfield & Co.*, 125 Fed. 696 (1903).

<sup>21</sup>*Atlantic Transport Co. v. Imbrovek*, 234 U. S. 52, 58 L. Ed. 1208, 34 Sup. Ct. 733 (1914).

mining whether in addition to satisfying the locality test the tort must arise out of a maritime transaction, was avoided by holding that the services of a longshoreman are maritime. In a number of recent decisions by the Supreme Court,<sup>22</sup> locality has been referred to as though it were the sole test for tort jurisdiction. The generality of the language employed in these cases would of itself be sufficient to show that it is so regarded at present by the Supreme Court, but it is not necessary to rely wholly upon general statements. In *Grant Smith-Porter Co. v. Rohde*<sup>23</sup> the question of the applicability of a state workmen's compensation act to an injury suffered by a worker on a vessel already launched but still in the course of construction came before the Supreme Court. Among other questions certified was that of admiralty jurisdiction. As it is well settled that a vessel in the course of construction is not an instrument of maritime commerce and that services in building a ship are non-maritime,<sup>24</sup> the fact that jurisdiction was upheld was a distinct recognition by the Supreme Court that maritime jurisdiction of tort does not require that the wrong arise out of a maritime transaction. The only ground on which jurisdiction could have been recognized was locality, the tort having been consummated on a floating structure and hence on waters subject to maritime jurisdiction.

The cases already discussed, it is believed, lead to the conclusion that locality is the sole test for admiralty jurisdiction in tort in this country. Neither the attempt to substitute in certain cases the English statutory rule of "any claim for damage by any ship" nor the attempt to add to the locality test of *The Plymouth* the requirement that the tort grow out of maritime transaction has met with appreciable success. In fact, the later cases lay the basis for a prediction that when the question is squarely presented the Supreme Court will hold, with *The Rohde Case* as authority, that *The Plymouth* and the rules there laid down have always been controlling.

How is the test to be applied? Fact situations often arise where difficulties might be encountered. The test requires that the tort or its substance be consummated upon a maritime locality. What is meant by *maritime locality*? What is meant by *consummation*?

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<sup>22</sup>See particularly cases arising out of the application of state workmen's compensation acts. *Industrial Commission v. Nordenholt Corp.*, 259 U. S. 263, 66 L. Ed. 933, 42 Sup. Ct. 473 (1922); *Grant Smith-Porter Co. v. Rohde*, 257 U. S. 469, 66 L. Ed. 321, 42 Sup. Ct. 157 (1922); also *Western Fuel Co. v. Garcia*, 257 U. S. 233, 66 L. Ed. 210, 42 Sup. Ct. 89 (1921).

<sup>23</sup>257 U. S. 469, 66 L. Ed. 321, 42 Sup. Ct. 157 (1922).

<sup>24</sup>*People's Ferry Co. v. Beers*, 20 How. 393, 15 L. Ed. 961 (1858). See also *BENEDICT'S ADMIRALTY*, p. 91.

In the early cases the Supreme Court confined jurisdiction to waters subject to the ebb and flow of the tide, refusing jurisdiction of inland waters.<sup>25</sup> But with the opening of the West and the growth of shipping on the Great Lakes and the Mississippi and her tributaries these waters, partly through prodding by Congress and partly through the initiative of the courts, were held to be maritime.<sup>26</sup> But these waters are clearly highways of interstate or international commerce. What of navigable waters wholly within a state which are incapable of use in interstate or international commerce, such as inland lakes or the ponds of New England, with no navigable outlet to other states or the ocean? These latter have been held not to be maritime within the meaning of the Constitution, and it would seem necessary that waters to be subject to admiralty jurisdiction be capable of use as highways of interstate or foreign water-borne commerce.<sup>27</sup>

In several cases attempts have been made to include within maritime locality objects, which though on land, are capable of maritime use. This has been particularly true of libels for injuries sustained while repairing a vessel in dry dock. In *The Anglo-Patagonian*,<sup>28</sup> maritime jurisdiction was upheld even though the worker was not injured on the vessel but on a scaffold erected on the outside of the ship. The court in reaching this result had recourse to several decisions of the Supreme Court, no one of which was applicable to the situation before it. *Perry v. Haines*,<sup>29</sup> cited by the court, was a case dealing with contract jurisdiction and as the test in contract is its nature and locality, the case was clearly not applicable. A decision upholding a claim for salvage service rendered a vessel in dry-dock was also cited.<sup>30</sup> But in that case the Supreme Court had been careful to confine its decision to salvage. *Atlantic Transport Company v. Imbrovek*<sup>31</sup> and *The Raithmoor*<sup>32</sup> were also referred to as supporting the conclusion that a dry-dock as such is a maritime locality, but in the first case the tort occurred on a ship on navi-

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<sup>25</sup>Note 1, *supra*.

<sup>26</sup>The Genesee Chief, note 2, *supra*, and cases cited in notes 3 and 4, *supra*. In *The Genesee Chief* the "prodding" consisted in an act of Congress conferring jurisdiction, the case upholding the constitutionality of this statute.

<sup>27</sup>*Starr v. The Clyde*, 43 Minn. 192, 45 N. W. 430 (1890). See particularly *The Robert W. Parsons*, 191 U. S. 17, 48 L. Ed. 73, 24 Sup. Ct. 8 (1903).

<sup>28</sup>235 Fed. 921 (1916). See *contra The Warfield*, 120 Fed. 847 (1903).

<sup>29</sup>Note 27, *supra*, where cited as *Robert W. Parsons*.

<sup>30</sup>*Simons v. Jefferson*, 215 U. S. 130, 54 L. Ed. 125, 30 Sup. Ct. 54 (1909).

<sup>31</sup>Note 20, *supra*.

<sup>32</sup>Note 16, *supra*.

gable waters. In the second, the injury was to a structure which the Supreme Court had held to be maritime because of its locality and design. Admitting that the cases cited by the court were not in point, was its decision erroneous? Clearly a ship drawn up on a maritime railway for repair would no longer have its locality on maritime waters, and hence an injury sustained on it would be non-maritime. But suppose the ship is in a floating dry-dock. Would not an injury sustained in the dry-dock be a maritime injury, having occurred on maritime waters? Such a holding would not make the dock as such a maritime locality but would recognize its locality as maritime because of the fact that it is a structure floating on maritime waters. This was the conclusion reached in a recent case decided by the Supreme Court which based its decision wholly on an application of the locality test as referring to maritime waters and not on a theory which attributes to a dry-dock a fictitious locality because of its use.<sup>33</sup>

Accepting the decisions as requiring that the locality be the high seas or navigable waters, under what conditions may it be said that the tort occurs on such waters? In *The Plymouth*<sup>34</sup> it was stated that the wrong, or at least, the substance and consummation of the same must have taken place on maritime waters. What is meant by the consummation of the wrong? What circumstances must exist in order that the tort be consummated on waters subject to admiralty jurisdiction? When all the facts have a maritime locality there can hardly be any difficulty. Two steamers collide due to negligent navigation. Here the negligent navigation, the impact of the steamers brought about by the negligence, and the damage all occur within a maritime locality. No one would question the jurisdiction of a court of admiralty. But suppose that some of the facts take place on land while others occur on maritime waters. To illustrate: A is leaving a vessel by means of a ladder insecurely attached to the ship. The ladder slips and A falls to a dock where he receives physical injury. Here the negligence consisted in failure to perform an act which should have been performed on the ship. It operated on A while he was on board the ship. The physical injury resulting in damage was received on the dock, a part of the shore. Would it make any difference if the ladder were insecurely fastened to the dock? The negligence would then be the failure to perform an act which should have been performed on shore. Further, would the result be dif-

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<sup>33</sup>*Gonsalves v. Morse Dry Dock & Repair Company*, 266 U. S. 171, 69 L. Ed 80, 45 Sup. Ct. 39 (1924).

<sup>34</sup>Note 5, *supra*.



ferent if A instead of falling directly to the dock first struck the side of the ship, receiving additional injury on hitting the dock? In such a case the physical injury received on striking the side of the vessel would be received on a maritime locality but the additional injury on the dock would be incurred on land. Suppose A instead of leaving the ship were boarding it and the slipping of the ladder caused him to fall before reaching the ship. The negligence would then operate on A before he reached a maritime locality. In the cases given or those suggested by the questions put the facts leading up to the cause of action take place partly on land and partly on maritime waters. What facts must occur upon maritime waters to confer jurisdiction?

Before attempting to answer this question it should be noted that the circumstances leading up to A's cause of action pass through three successive stages. First, there is the negligence consisting in the failure to fasten the ladder. Second, as a result of this negligence the ladder slipped, causing A to fall. Third, A struck the dock, receiving physical injury and damage there, in one case, and, in another, he first struck the side of the ship, receiving additional injury and damage on hitting the dock. A dictum in *The Strabo*,<sup>35</sup> a case in which the whole problem was discussed at length, would give an admiralty court jurisdiction if A at the time of the "impact of the negligent force" were on the ship. In other words, according to this dictum, if the negligence operated on A on the ship the case would be of admiralty cognizance regardless of subsequent consequences. Will this view stand analysis? A tort has not been *consummated* until the occurrence of facts necessary to the existence of a cause of action. It would seem that in each case involving a question of admiralty jurisdiction inquiry should be directed to the locality of those facts which first give rise to an actionable wrong. Applying this to the successive stages of the facts leading up to A's cause of action clearly the locality of the negligence (admitting that negligence can be assigned the locality where an act should have been performed or where an act has been negligently performed) would be immaterial, as negligence alone does not give rise to a cause of action. Hence whether the negligence consisted in failure to fasten the ladder to the ship or the dock would be unimportant. Likewise

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<sup>35</sup>90 Fed. 110 (1898). In this case, after arguing at length that jurisdiction would be sustained under the facts as originally stated, the court finally held that if any injury had been sustained before striking the dock jurisdiction would be upheld. The decision was affirmed in 98 Fed. 998 (1900). For other cases involving injuries incurred in boarding and leaving a ship see *H. S. Pickands*, 42 Fed. 239 (1890), and *The Albion*, 123 Fed. 189 (1903). See also *Gordon v. Drake*, 193 Mich. 64, 159 N. W. 340 (1916).

the operation of the negligence upon A when still on the ship would be immaterial for jurisdictional purposes, as without actual injury and damage A would then have no cause of action. A's cause of action would not arise until he suffered injury and damages, and hence as there was no damage until he hit the dock the wrong would become actionable only upon land, the locality of the first facts bringing into existence the cause of action, and the tort would, therefore, be a land tort. On the other hand, if A received injury and damage before striking the dock by coming into contact with some part of the ship the cause of action would be maritime because the facts necessary for its existence would then occur on a ship on maritime waters. If A at the time of the fall had not reached the ship and fell directly to the dock, admiralty, of course, would be without jurisdiction, but if he struck the ship before striking the dock the wrong could be maritime, as then again the facts bringing into existence the wrong would occur on the ship or maritime waters. The foregoing analysis was applied in a recent case,<sup>36</sup> the facts of which were unusual. Goods stored on a municipal dock fell into navigable water due to the negligent maintenance of the dock. The court in upholding jurisdiction did so on the theory that there was no actionable wrong arising out of the negligence until damage had been incurred, which was not until the goods had fallen into navigable waters. A decision by the Supreme Court<sup>37</sup> might seem to be in conflict with this view. There a schooner knocked a hole into a grain elevator, causing corn to fall through the hole into navigable water. Jurisdiction was denied. But in that case there was actual damage on hand. The injury to the elevator, and the subsequent injury to the corn was only an aggravation of the original wrong. The cause of action first arose on land because it was there that occurred the facts first bringing the cause of action into existence.

It is believed that from the discussion in the foregoing pages it may be fairly stated that the sole test for tort jurisdiction is locality. Maritime locality comprises the high seas and navigable waters capable of use as highways of interstate and international water-borne commerce. Where all the facts occur on maritime waters the tort is clearly of admiralty cognizance. And, where the facts are partly land and partly maritime, jurisdiction depends on principle on the locality of the facts the existence of which first give rise to an actionable wrong.

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<sup>36</sup>*Firemen's Fund Insurance Company v. City of Monterey*, 6 Fed. (2d) 89 (1925). Cf. *The City of Lincoln*, 25 Fed. 835 (1885).

<sup>37</sup>*Johnson v. Chicago & P. Elevator Co.*, 119 U. S. 388, 30 L. Ed. 477, 7 Sup. Ct. 254 (1885). See also *The Haxby*, 95 Fed. 170 (1899).

There remains the soundness of the test. Criticism should be based on a consideration of practical consequences. The words of the grant have no inherent meaning and it is only through the decision of cases that they take on definite tangible form. Historically the test is sound. In England<sup>38</sup> with a few exceptions even at the low ebb of admiralty jurisdiction locality was the test in both tort and contract. In the United States it was assumed to be so in tort in the earlier decisions, the only question being that of the extent of the waters included. Further, while there have been attempted digressions, no decision of the Supreme Court has departed from the test. Turning to the practical consequences the most advantageous is the fact that it is comparatively easy of application. The only real difficulties to be met with are those arising out of the application of one of its terms, namely, *consummation* of the tort, but even here if the facts in each case are analyzed no particular difficulty need be experienced. It is true that somewhat startling results may be reached. Examples of such results have been given.<sup>39</sup> A, standing on shore, throws a rock at and hits B, swimming in navigable waters. A libel concerning a person having no connection with a ship is circulated on board. Strict application of the test would confer jurisdiction in spite of the fact that in neither case has the tort even a remote connection with navigation or commerce. These cases are extremely hypothetical, but if they should arise any attempt to make exceptions would result in confusion. Also, such an attempt would only serve to make inroads on a rule which is easy of application and which in most instances reaches results that are not necessarily surprising. The fact that in a few unusual instances the results reached may be so is counterbalanced by the fact that strict application of the test makes it possible to predict with accuracy the results to be reached in a given case.

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<sup>38</sup>See *De Lovis v. Boit*, Fed. Cas. No. 3, 776 (1815).

<sup>39</sup>See *BENEDICT'S ADMIRALTY*, p. 196.

## UNIFORM STATE LAWS

### AN ECONOMIC LEGAL DEVELOPMENT RESULTING FROM THE RELATION OF THE STATE TO FEDERAL GOVERNMENT

#### *The Origin of the National Conference of Commissioners on Uniform State Laws*

The organization referred to originated in 1892, as a result of an informal discussion among members of the American Bar Association. The subject of conversation was the rapid extension of the Federal arm into what had been previously considered State affairs. It being apparent that the encroachment of the Federal jurisdiction to cover subjects previously regarded as peculiar to the respective States was a natural development under the Federal Constitution since the enactments of Congress and the construction of the Federal Constitution and statutes by the courts were designed to safeguard the rights of the citizens of the nation as such, it was concluded that the only practical means of remedying the situation would be by creating a condition making it unnecessary for the individual citizen to seek relief through Federal agencies. These reflections are embodied in the statement of the object of the National Conference as appears in its constitution, which is to "promote uniformity in State laws on all subjects where uniformity is deemed desirable and practicable."

The trend of thought of our people is voiced in a recent utterance of President Coolidge when he says:

Unfortunately the Federal Government has strayed far afield from its legitimate business. It has trespassed upon fields where there should be no trespass. If we could confine our Federal expenditures to the legitimate obligations and functions of the Federal Government, a material reduction would be apparent. But far more important than this would be its effects upon the fabric of our constitutional form of government, which tends to be gradually weakened and undermined by this encroachment.

If we are to maintain the nation and its government institutions with a fair semblance of the principles on which they are founded, two policies must be supported. First, the principle of local self-government in harmony with the needs of each State. This means that in general the States should not surrender, but retain their sovereignty and keep control of their own government.

Our country having devised this dual system of government—and lived under it longer than any other, is deeply concerned to perfect and adapt it to the changing conditions of organized society. A community comprising half a continent and more than 100,000,000 people could not possibly be administered under



a single government organization. We must maintain a proper measure of local self-government while constantly making adjustments to an increasing interdependence among the political parts.

President Coolidge comes from a section of the country where the doctrine of "States' Rights," as distinguished from those of the centralized authority, is coming into bold relief. In his message to the Sixty-ninth Congress, the President says:

In our country the people are sovereign and independent and must accept the resulting responsibility. It is their duty to support themselves and support the government. That is the business of the nation, whatever the charity of the nation may require. The functions which the Congress are to discharge are not those of local government, but of national government. The greatest solicitude should be exercised to prevent any encroachment upon the rights of the States or their various political subdivisions. Local self-government is one of our most precious possessions. It is the greatest contributing factor to the stability, strength, liberty and progress of the nation. It ought not to be infringed by assault or undermined by purchase. It ought not to abdicate its power through weakness or resign its authority through failure. It does not at all follow that because abuses exist it is the concern of the Federal Government to attempt their reform.

The tendency of Federal overreaching into State activities has resulted in a measure of "absentee control" under which congressional agencies and bureaus functioning at the site of national government take from the individual vital rights of self-government. Citizens are required to submit local problems to representatives of a far-away authority. Secretary of Commerce Herbert Hoover is quoted as saying that "it is always hard for a government bureau to go into details and understand the viewpoint of a distant locality. Wherefore, it is commonly agreed now, after considerable experience with centralized authority, that the States and cities should work harder in the democratic and genuinely American business of solving their own problems whenever that is possible, instead of unloading them on an already overburdened central government. It is evident that as time goes on more of our problems are referred to Washington because they involve jurisdiction extending beyond State lines and often interlinking many States." The leaders of public thought in this country are genuinely concerned about our problems of bringing a major part of governmental activities under one control.

Thomas Jefferson foresaw the tendency of centralized government when he said:

The judiciary of the United States is the subtle corps of sappers and miners constantly working underground to mine the foundations of our confederated fabric. They are constructing our constitution from a co-ordination of a general and special government to a general and supreme one alone.

#### SCOPE OF ACTIVITIES

The National Conference is a "melting pot" for the harmonious blending of the commercial and social customs, usages and laws of the several jurisdictions. As indicated from the table of acts drafted by it, substantial uniformity of legislation has been accomplished in practically every American jurisdiction on the subject of negotiable instruments and warehouse receipts, both of which affect all the people in their everyday life. The Uniform Bills of Lading Act has been adopted in twenty-six jurisdictions, and the Uniform Sales Act in twenty-seven. These are the senior accomplishments of the conference. A glance at the table will also indicate a rapid adoption by the States of the more recent acts. Only the four finally accepted by the conference at its 1925 meeting and the Occupational Disease Act have not been enacted by the legislatures of one or more States. Doubtless these and many others will be enacted into law at the coming session of the State legislatures.

A table of uniform acts heretofore drafted and approved, with the year of approval and number of jurisdictions adopting each act follows:

| Name                                       | Year of Approval | No. of<br>Jurisdictions<br>Enacting |
|--------------------------------------------|------------------|-------------------------------------|
| 1. Acknowledgments Act .....               | 1892             | 9                                   |
| 2. Acknowledgments Act, foreign.....       | 1914             | 7                                   |
| 3. Aeronautics Act .....                   | 1922             | 10                                  |
| 4. Arbitration Act .....                   | 1925             | 0                                   |
| 5. Bills of Lading Act.....                | 1909             | 26                                  |
| 6. Child Labor Act.....                    | 1911             | 4                                   |
| 7. Cold Storage Act.....                   | 1914             | 6                                   |
| 8. Conditional Sales Act.....              | 1918             | 10                                  |
| 9. Declaratory Judgments Act.....          | 1922             | 8                                   |
| 10. Desertion and Non-Support Act.....     | 1910             | 19                                  |
| 11. Extradition of persons of unsound mind | 1916             | 8                                   |
| 12. Fiduciaries Act .....                  | 1922             | 10                                  |
| 13. Foreign Depositions Act.....           | 1920             | 10                                  |
| 14. Flag Act .....                         | 1917             | 9                                   |
| 15. Fraudulent Conveyance Act .....        | 1918             | 14                                  |
| 16. Illegitimacy Act .....                 | 1922             | 5                                   |

| Name                                     | Year of Approval | No. of Jurisdictions Enacting |
|------------------------------------------|------------------|-------------------------------|
| 17. Interparty Agreement Act.....        | 1925             | 0                             |
| 18. Joint Obligations Act.....           | 1925             | 0                             |
| 19. Land Registration Act.....           | 1916             | 3                             |
| 20. Limited Partnership Act.....         | 1916             | 14                            |
| 21. Marriage and Marriage License Act... | 1911             | 2                             |
| 22. Marriage Evasion Act.....            | 1912             | 5                             |
| 23. Negotiable Instruments Act.....      | 1896             | 51 <sup>1</sup>               |
| 24. Occupational Diseases Act.....       | 1920             | 0                             |
| 25. Partnership Act .....                | 1914             | 16                            |
| 26. Proof of Statutes Act.....           | 1920             | 7                             |
| 27. Sales Act .....                      | 1906             | 27                            |
| 28. Stock Transfer Act.....              | 1909             | 17                            |
| 29. Vital Statistics Act.....            | 1920             | 1                             |
| 30. Warehouse Receipts Act.....          | 1906             | 48                            |
| 31. Wills Act, foreign executed.....     | 1910             | 7                             |
| 32. Wills Act, foreign probated.....     | 1915             | 4                             |
| 33. Workmen's Compensation Act.....      | 1914             | 3                             |
| 34. Written Obligations Act.....         | 1925             | 0                             |

## MACHINERY OF CONFERENCE

I shall cite the framing of the Negotiable Instruments Act as illustrative of the machinery of the Conference of Commissioners.

Quoting from Hon. W. O. Hart, Commissioner from Louisiana:<sup>2</sup>

The greatest work of the conference was the preparation and submission to the states in 1896 of the Negotiable Instruments Law. Six years before the conference was organized and four years before the suggestion of the appointment of commissioners was adopted in New York, Mr. Frederick G. Bromberg of Alabama . . . suggested to every Bar Association in the United States the preparation and adoption in all the states of a uniform law on this important subject, based upon the English Bills of Exchange Act. . . .

This law was first adopted in the State of New York in 1897.

It was at the annual conference in Detroit in 1894 that a resolution was passed requesting the Committee on Commercial Laws to prepare, as soon as practicable, a draft of a bill relating to commercial paper based upon the English Bills of Exchange Act, and upon such sources of information as the committee might deem proper to

<sup>1</sup>Four territories and all the states except Georgia.

<sup>2</sup>CASE AND COMMENT, Vol. 23, No. 8, p. 646.

consult. The matter was referred to a sub-committee, who secured Mr. John J. Crawford of the New York Bar, a well-known expert on the law of bills and notes, to draft the proposed bill. Mr. Crawford's draft was laid before the sub-committee and with amendments was submitted to the conference at Saratoga in 1896. There were twenty-seven commissioners in attendance, representing fourteen states. They considered and debated the act, section by section, making some amendments to it. The draft as it was amended, was approved by the conference, and in such form has been submitted to the various state legislatures. It has now been adopted in fifty-one jurisdictions.<sup>3</sup>

Henry Craig Jones, Dean of the College of Law of the University of Iowa, commenting upon the Negotiable Instruments Act, quoted the Committee of American Bankers' Association as saying, "a more useful and more thoroughly prepared statute on commercial law would be difficult to find." Continuing, Mr. Jones says:

The acknowledged benefits which have come to commerce and all industries, agriculture and manufacturers alike, through the uniformity, certainty and clarity given thereby to the law of negotiable paper, have truly proved the wisdom of the minds which conceived and brought it and other uniform acts into being.

While the Negotiable Instruments Act has had the widest influence upon American jurisprudence of any of the uniform acts promulgated by the National Conference, it has by no means consumed as much of the time of the conference as have other acts presented to it for consideration.

#### DIFFICULTIES IN DRAFTING UNIFORM ACTS

The Uniform Incorporation Act is now in its tenth tentative draft. This means that for nine times it has run the gauntlet of conference debate. The chairman of the committee in presenting the ninth tentative draft to the conference prefaced his committee's report in part as follows:

In pursuing its work, the committee has been fully cognizant of the wide divergence of view in different sections of the United States concerning the attitude that should be observed toward the organization and functioning of business corporations. Speaking broadly, it may be said, with reference to these dif-

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<sup>3</sup>Cf. *UNIFORM STATE LAWS, ANNOTATED*, by CHARLES THADDEUS TERRY, page 17; *REPORT OF COMMITTEE OF AMERICAN BAR ASSOCIATION ON UNIFORM STATE LAWS*, 1925.



ferent views, that the several states of the Union may be classified as follows:

(a) Those which seem to regard corporations principally as a source of revenue to the state.

(b) Those which seem to regard the corporation somewhat suspiciously as something to be dealt with in an extremely regulatory manner.

(c) Those where the corporation seems to be neither feared on the one hand, nor specially encouraged for purposes of revenue on the other, but where incorporation is permitted to be effected as an ordinary incident of business, allowing generous latitude in such organization and imposing no specially drastic regulations.

The committee does not entertain the belief that all these discordant views and all these conflicting regulations can be harmonized completely, nor so nearly harmonized as to present an act upon which all the members of the conference can fully agree. It does feel, however, that a close approximation to that desired end can be reached.

After mature consideration, the committee reached the conclusion that as a proper step in that direction it should confine its efforts to framing an act dealing solely with the subject of incorporation, and leave for future consideration an act or acts dealing with allied subjects, such as reorganizations, mergers, consolidations, dissolution proceedings, etc.

Pursuant to that conclusion, and to the belief expressed by the committee in its last annual report that "it can yet bring to the conference as the final fruition of its efforts a Uniform Incorporation Act that will be practical, simple, comprehensive and at the same time in keeping with the advanced thought of public-spirited students of corporate problems and in conformity with the proper demands of present-day business necessity," the *Ninth Tentative Uniform Incorporation Act* is submitted herewith.

In the consideration of the Uniform Incorporation Act, the conference committee is now employing Robert F. Stevens, Professor of Corporation Law in Cornell University Law School, as its draftsman. The committee and Professor Stevens have called to their assistance leading authorities on corporation law in all parts of the United States. The American Law Institute is working in close harmony with the National Conference on this subject. The reporter for the American Law Institute on "*A Restatement of the Common Law of Business Associations*," who is also the executive head of the Institute, Dr. William Draper Lewis of Philadelphia, has designated the members of the National Conference committee on this subject as advisers to him in the "*Restatement of the Common Law of Business Associations*." This subject incidentally includes corporations.

It will be seen, therefore, that a great and an earnest work is being done to make uniform the law of incorporation. This law has to do with an agency of the American people controlling a large and ever increasing proportion of their business, social and religious activities.

The draftsman or expert of the conference, having framed a group of sections of a proposed act, submits them to the various members of the committee handling that subject. These members record their criticisms and suggestions, which in turn are considered by the draftsman, who later presents to his committee a complete draft of the act. This the committee, in open session, considers line by line, and section by section, referring it back to the draftsman, who again goes over the draft, reframing, annotating and resubmitting it to the various members of the committee with his changes. With the help of the suggestions of the committeemen, the expert redrafts the entire act, when it is again submitted to the entire committee for analysis and study. When the committee thinks the draft is whipped into shape to present to the National Conference sitting in the committee of the whole, it is reported as the..... (number) tentative draft of the designated act. The committee of the whole have the utmost freedom of discussion. Many a discouraged committee bravely and loyally buckles down to a reconsideration of a subject they have long since become wearied of.

A reference to the consideration of a few other uniform acts will not be without interest. The Uniform Sales Act was prepared by Dr. Samuel Williston in 1902 and 1903. In the latter year it was distributed to teachers of the law of sales and to writers and other experts on the subject, with a request for criticism. In the light of such criticism the draft was revised and presented to the conference in 1904, but it was not finally adopted until 1906 after a section by section thorough consideration by the conference. The Warehouse Receipts Act was formulated by Dr. Williston and Mr. Barry Mohun of the Washington City Bar. These gentlemen were professionally employed by the commissioners for this service. After critical consideration by the American Warehousemen's Association and the Committee of American Bankers' Association, and after diligent revision by the commissioners in 1906, it was finally adopted in 1907.

So, with variation in detail of origin and course through the conference, uniform acts have been drafted and enacted into law by the various states on the following subjects: Annulment of Marriage and Divorce; Bills of Lading; Stock Transfer; Desertion and Non-Support; Child Labor; Marriage and Marriage License; Marriage Evasion; Partnership; Workmen's Compensation; Acknowledg-

ments; Foreign Wills; Land Registration; Limited Partnership; Extradition; Flag; Conditional Sales and Fraudulent Conveyances.

#### UNIFORM STATE LAWS CONSIDERED IN 1925

The work of the National Conference in 1924-25 was reviewed briefly by Nathan William MacChesney, President of the Conference of Commissioners, 1924-25, in the December number of *AMERICAN BAR ASSOCIATION JOURNAL*, page 807. They are discussed under the heads of:

- (a) Uniform Commercial Acts.
- (b) Uniform Property Acts.
- (c) Uniform Social Welfare Acts
- (d) Uniform Public Law Section.
- (e) Uniform Corporation Acts.
- (f) Uniform Torts and Criminal Law Section.
- (g) Uniform Civil Procedure Section.

Under the head of Uniform Commercial Acts, mention is made that the act relating to the sale of securities is still under consideration. The first draft of a "Trust Receipts Act" was considered but referred back to a committee at the suggestion of the American Law Institute. Acts known as "Uniform Written Obligations Act," "Uniform Interparty Agreement Act," and "Uniform Joint Obligations Act" were considered by the conference and adopted.

Under the subject of Uniform Property Acts, there was considered a substitute for the present Uniform Acknowledgments Act, the new act to be designated "Uniform Acknowledgments of Instruments Act." This act was referred back to the committee for further consideration and report in 1926. At the request of the American Title Association, the National Conference has under consideration fifteen proposals as to the feasibility of making uniform certain laws affecting titles. The conference has under consideration a Federal statute governing notice of tax liens. After consideration for many years of the Uniform (real estate) Mortgage Act, the conference, after due consideration, carefully considered the fifth tentative draft of such an act and declined to recommend legislation on the subject. A third tentative draft of a Uniform Chattel Mortgage Act prepared by Professor Karl N. Llewelyn of Yale University Law School was presented to the conference for consideration and referred back to the committee.

Under the head of Social Welfare Acts, the preparation of a Uniform Child Labor Act was taken under consideration. A Narcotic Drug Act was referred back to the committee for further consider-

ation. The conference has under consideration an act for the Joint Parental Guardianship of Children. The National League of Women Voters have requested the conference to take cognizance of the change in social conditions and accordingly consider redrafting the Uniform Divorce Act. A committee on this subject was appointed by the conference.

In the Uniform Public Law Section, an act for a Tribunal to Determine Industrial Disputes is awaiting the action of the Supreme Court of the United States on cases involving vital questions of concern on the settlement of industrial disputes. The committee on this subject was, therefore, continued.

The consideration of a Primary Act for Federal Officers was regarded by the conference as not pertinent to its purpose.

The first draft of a Uniform Public Utilities Act was submitted and referred back to the committee.

The great importance of the rapidly changing conditions relative to the character and use of vehicles during recent years has occasioned the conference to take cognizance of a Uniform Vehicle Act, a second draft of which was referred back to the committee for further consideration.

A Uniform State Inheritance Tax Act was taken under consideration by the conference at the suggestion of President Coolidge. A committee was appointed to draft such an act.

The conference adopted an Aeronautics Act in 1922, and in view of the criticism of this act concerning the question of the ownership of the super-incumbent air or space by the owner of the land, this subject was referred back to the appropriate conference committee for further consideration.

Under the subject of Uniform Incorporation Act, the conference was advised by its committee that the tenth tentative draft upon the subject was partially completed but not ready for consideration.

Under the subject of Uniform Torts and Criminal Law a draft of an act was presented to the conference. A Uniform Firearms Act was referred back to committee.

Under the subject of Uniform Civil Procedure, an Arbitration Act was adopted and a committee appointed to submit a draft of a Mechanic's Lien Act. Committees were also appointed upon Standardized Milk and Cream Containers; Compulsory Automobile Insurance; Notice to Legatees before Probate.

Mr. MacChesney pointed out that thirteen adoptions of Uniform Acts and five adoptions of amendments of uniform acts recommended by the conference had been accomplished, naming the subjects and the states of adoption. Considering that the year 1924 was an "off"



legislative year, and that twenty-seven adoptions had taken place in 1923, the year 1924 is regarded as highly satisfactory as a stamp of continued public approval of the work of the National Conference.

The interest with which the country looks forward to and relies upon the work of the National Conference is evidenced by the fact that the states will at times, as did the Legislature of Nevada, pass a uniform act while still in its tentative shape. This was done by that state with the Uniform Arbitration Act.

#### IS ACTUAL UNIFORMITY BEING ACCOMPLISHED?

Hon. Herbert M. Bierce,<sup>4</sup> discussing the question, *Are We Securing Actual Uniformity in Legislation*, interprets the purpose of the commissioners on Uniform State Laws to be:

First: Uniformity of reference.

Second: Uniformity of enactment.

Third: Uniformity of interpretation.

Mr. Bierce expresses a doubt as to "Whether we are getting actual Uniformity of Enactment," and uses the Negotiable Instruments Act as affording the best illustration. He says:

If features of a proposed uniform law which had received the consideration and thought that was given to the Negotiable Instruments Law, yet left in the opinion of capable minds doubts as to the wisdom of certain sections as occurred in that instance, we may well anticipate like criticism of other proposed laws which arouse as general consideration.

He mentions that some of the provisions of the Negotiable Instruments Act, even though it had received the approval of the American Bar Association, were severely criticised by Professor James Bar Ames, then Dean of Harvard Law School, which criticism was answered by Judge Lyman D. Brewster, the then President of the National Conference, and since have been the subject of considerable discussion in the law journals. Continuing, Mr. Bierce cites the work of Jos. Doddridge Brannan, Professor of Law Emeritus in Harvard University, on the Negotiable Instruments Law, mentioning several changes in the act as enacted by the various states and claiming that at least fifty per cent of the sections of the law have been changed in some way in enactment or subsequent amendment, the criticisms of Professor Ames having been enacted as a part of the law in lieu of the uniform sections.

Mr. Bierce very properly states that

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<sup>4</sup>COMMERCIAL LAW LEAGUE JOURNAL, Vol. 30, No. 12, page 674.

It is in the field of judicial interpretation that the most serious injury is being done to the purposes sought to be secured in uniformity of legislation.

It is to meet this serious situation that the National Conference have constituted an important committee designated as a committee on "Uniformity of Judicial Decisions." This committee has done a valuable work in making contact with the judiciary of the country and impressing upon the judges the great importance of uniformity in judicial interpretation. As one of the standard provisions of every uniform act, it is now provided that

This act shall be so interpreted and so construed as to effectuate its general purpose to make uniform the laws of those states in which enacted.

Unfortunately, this provision was not incorporated in the earlier acts of the conference.

Mr. Bierce cites the case of *First National Bank v. Lightner*,<sup>5</sup> and the case of *Liberty State Bank v. Metropolitan Church Association*,<sup>6</sup> as illustrative of the conflict in the Uniform Negotiable Instruments Act growing out of a different interpretation by the courts of different states, and says:

In case of an instrument in common form which has appended to it any extraneous words indicating a fund from which reimbursements may be made, if brought before a Kansas court will very likely be held negotiable; whereas its judicial determination in Minnesota remains a matter of doubt, to say the least.

#### BENEFITS

Among the accomplishments of the National Conference is the drafting of uniform laws affecting commerce among the states. This work has assisted materially in stabilizing credit, designated "the mightiest force of commerce" and "the great medium of exchange in the distribution of all products of farm and factory." The manufacturer in New England, for instance, is able to call in his local attorney to ascertain the law of negotiable instruments, bills of lading and warehouse receipts, affecting shipments made to the southwest. The attorney ascertaining that the distant state has the uniform act, can safely advise. The transaction becomes simple, the credit safe; and commerce is expedited. The producer of the raw

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<sup>5</sup>74 Kan. 736, 88 Pac. 59, 8 L. R. A. (N. S.) 231, 118 Am. St. Rep. 353, 11 ANN. CAS. 596 (1906).

<sup>6</sup>154 Minn. 248, 191 N. W. 414 (1923).

material exchanges, through the medium of credit and transportation, his raw product, for the manufactured article provided him by the distant manufacturer. And so the wheels of commerce are greased and a people made happy and prosperous. Individuals far removed deal with one another with confidence and respect. The commercial world is made small. Opportunities for education and recreation follow in the wake of facilitated commerce. Thus uniformity of legislation among the respective states "on all subjects where uniformity is deemed desirable and practicable," takes its place as one of the chief instrumentalities in the development and safeguarding of the rights of a democratic community of a size and to an extent which the world has never before seen.

The value of uniformity in legislation should be considered also in its effect upon the number of decisions and statutes. In 1882 the *AMERICAN LAW REVIEW* published a compilation showing that since the first report was printed in America in 1789, the American State and Federal reports were less than three thousand in number. From that date to 1882, covering a period of nearly one hundred years, there were published, to be precise, 2944 reports. During the ensuing twenty-eight years, or until 1910, there were published eight thousand volumes. This prompted *LAW NOTES*<sup>7</sup> to comment:

The huge and rapidly increasing enumeration of reported and digested cases makes it a situation demanding careful study to cope with it. . . . There will be no reflux in this tide and the inundation is bound to bring distress to many of the coming generations of lawyers. You will observe from the above that in the twenty-eight years prior to 1910 there were more volumes of reported cases than in the one hundred years preceding. The economic problem involved in the various elements resulting in these reports demands the best thought of our profession. The human energy expended by litigants, lawyers and courts, not to mention the actual money wasted, is a drain upon the resources of the country, which if turned into productive channels would build a railroad, canals and irrigate vast arid areas, reclaim large overflowed land and otherwise develop the resources of our country.

THE CORPORATION JOURNAL,<sup>8</sup> citing the *AMERICAN BAR ASSOCIATION JOURNAL*, reads:

In spite of the many warnings in addresses to bar associations, magazine articles, and letters to newspapers during the last several years, there is no subsiding of the waves of legislation. New

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<sup>7</sup>April, 1910.

<sup>8</sup>Vol. VI, No. 128, May, 1924.

laws roll to us in overtoppling volume at the end of each legislature and threaten to swamp the profession. At the session in New York, which adjourned April 10, 1924, one thousand eight hundred and thirty-four bills were introduced in the House and one thousand six hundred and thirty-three in the Senate. Of those passed, the Governor on April 25 had signed five hundred and one measures, and there are many more at the date of this writing awaiting his signature.

Former Governor Harding of Iowa estimated that forty-three states in 1923 enacted 15,000 new laws. During the same period Congress enacted 300 new laws, and towns, cities and counties added 200,000 laws and ordinances to the total. The interpretation of these laws by Federal and State Supreme Courts in a single year required 650 volumes of law reports, to say nothing of the printed reports of tribunals of more general jurisdiction.

Hon. Jesse J. Dunn of the Supreme Court of Oklahoma, commenting on this serious situation, says:

A large percentage of these cases find their source in controversies incident to conflict in or an uncertainty or ignorance of the written and unwritten law, or a difference existing in the construction of the governing rules relating to all kinds of intercourse in our different states; and every legislature turns into this eddying current its turbid tide of inaccurate, inconsistent, incongruous statutes, all of which help to swell the congested and swollen stream. So that legislation, litigation and publication lead on abreast to the distress of the business world, the destruction of domestic tranquility and the burden of the taxpayer, the bench and bar.

Speaking of the work in behalf of uniform state laws, Mr. Stimson classes it as "The most important juristic work undertaken in the United States since the adoption of the Federal Constitution."

Judge Baldwin<sup>9</sup> credits the success of the Conference on Uniform State Laws as "one of the causes that encouraged the Netherlands to call the first Hague Conference."

Judge Brewster<sup>10</sup> has said:

The constantly increasing interstate trade and traffic, interstate migration, and the wonderful development of the means of intercommunication, fuse and unite all interests and localities. Variance, dissonance, contradiction, nay, any unnecessary diversity in the fifty subdivisions of the one American people in the general laws affecting the whole people in their business, and social relations cannot but produce perplexity, uncertainty and

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<sup>9</sup>17 HARV. L. REV. 400, 403.

<sup>10</sup>25 AM. L. REV. 832.



damage. Such diversity, always an annoyance, is often a nuisance. It is harmful and injudicious in the same way, in kind if not in degree, as it would be for us to have fifty different languages, or fifty different metric systems. The business man may well ask, why should not the meaning and effect of a promissory note, a bill of lading, or a guaranty be as certain and definite and practically identical in all the states as the meaning of words in an American dictionary, and for the same reason, the common convenience of all.

Judge Dunn, above quoted, speaking from a rich judicial experience, comments:

. . . if courts in the preparation of opinions were not confronted with the eternal question of where lay the weight of authority on any proposition, the opinions which they prepare could be reduced more than one-half their present length, for where the principles in the instant case had been passed upon by some court whose judgment and logic recommended its opinion as sound, but little more than a reference thereto would be necessary.

The National Conference of Commissioners on Uniform State Laws have done and are doing a great work in reducing the multitude of statutory enactments and in securing uniformity in judicial construction. As the President of the National Conference stated in his report to the American Bar Association at its Detroit meeting, 1925, thirty-four uniform acts have produced three hundred and fifty-nine legislative enactments. Reversing the arrangement of these figures, it appears that the three hundred and fifty-nine legislative bills consist of only thirty-four laws. It is easy, therefore, to see the possibilities for reducing the volume of decisions and the multiplicity of statutes. Carrying the figures a little further, the Negotiable Instruments Act, as an example, has been adopted by fifty-one states. If the thirty-four acts promulgated by the conference should receive the same unanimity of approval, then the result of its work would be one thousand seven hundred and thirty-four laws or separate legislative enactments. If each of the fifty-one jurisdictions should have a separate form of bill on each of the thirty-four subjects of legislation there would be one thousand seven hundred and thirty-four different laws, differently worded, subject to different construction, with the multiplicity of judicial opinion and bound volumes necessary to construe them.

Using the Uniform Sales Act as illustrative of commercial benefits flowing from uniformity in legislation, I quote from a pamphlet

issued by the National Conference of Commissioners on Uniform State Laws in 1921:

Uniformity in the law of sales of personal property is more important than uniformity in almost any other branch of the law. Every large business makes sales and purchases outside of the state where it has its headquarters. If the laws of the various states where it thus operates are identical, the problem of its rights and obligations is simplified. If, on the other hand, each state has its own separate and distinct law, a method of doing business which is safe and desirable in the home state may prove dangerous or unfortunate in another; and the chance that this may be so can be guarded against only by taking legal advice in every state where business is transacted. Many corporations make sales in every state of the Union, and in every state there are firms or corporations which approximate this degree of widespread activity. It seems difficult to suppose, under these circumstances, that any reasonable person can contend that uniformity in the law of sales is not intrinsically a very desirable thing.

The progress towards uniformity already achieved by means of the Uniform Sales Act makes it certain that states which now join a large and increasing number of jurisdictions which have already enacted the statute, will at once secure uniformity with the law of the most important commercial states of the Union, and that the number of states with which this uniformity will exist, will soon be added to. The statute is now in force in Alaska, Arizona, Connecticut, Idaho, Illinois, Iowa, Maryland, Massachusetts, Michigan, Minnesota, Nevada, New Jersey, New York, North Dakota, Ohio, Oregon, Pennsylvania, Rhode Island, Tennessee, Utah, Wisconsin, and Wyoming.

Among the advantages of enacting the statute is that it not only will make the law of a state which enacts it uniform with other states, but that it will make clear the answer to questions of law which have not yet come before the local courts for decision. In probably every state there are some questions for which the answer is provided in the Uniform Sales Act to which the local common law has as yet furnished no decisive answer; and in most states there are numerous such questions.

Legislation is cheaper than litigation as a means of fixing the law in this particular. Though the Commissioners on Uniform State Laws in presenting statutes for enactment have aimed primarily to secure uniformity they may fairly urge in support of their work whatever incidental advantages may be derived from uniform statutes; and, therefore, may not only emphasize the advantage just suggested of settling uncertain questions, but also that of stating the law in a compendious form where it is more easily referred to and more exactly determined than if it must be sought merely from decisions.

The arguments in favor of enacting such a statute seem so

convincing when merely stated that one who wishes to assure himself that nothing is being overlooked will inquire what possible arguments to the contrary there may be. Such an inquirer will find that any objections to the enactment of the law, which have been formulated by critics, fall under the following heads:

1. A general hostility to the multiplication of statutes and hence to even partial codification.

2. A lack of conviction that the statute in question is satisfactorily drawn.

3. A fear that it may change some existing rule of the local law in a manner detrimental to local interests.

More formidable, however, than any of these objections have proved in the past where the act has failed of enactment, are the indifference which comes from a failure to examine the question and the lack of adequate legislative time to dispose of matters which seem to press for more immediate attention.

If time is given for the consideration of the act, the grounds of criticism suggested above are easily disposed of.

As to the objection to the multiplication of statutes and to even partial codification, the answer is that all depends on the character of the statute. Doubtless the country suffers from too many statutes, but a statute of a comparatively small number of pages which condenses within itself law not otherwise to be found except by consulting hundreds of volumes, is not properly to be regarded as increasing the bulk of the law, but rather the reverse. It is doubtless true that many parts of the law are not at present, at least, in suitable condition for codification; but the law of sales of personal property is susceptible of being reduced to exact rules which can be definitely stated. This is almost as true of the subject as it is of the law of negotiable instruments, which has been made uniform by a statute now enacted practically throughout the United States. A provision in the Sales Act that matters for which no express provision is made in the statute shall be governed by the rules of the common law, precludes the possibility that might otherwise exist, of an unforeseen gap in the statute leaving some future dispute without a governing principle.

As to the character of the codification, the matter is no longer left for speculation or dispute. The time spent in the preparation of the statute—several years—the repeated examinations and re-examinations by the Conference of Commissioners on Uniform State Laws—a body containing some of the ablest lawyers in the United States—would render it probable that the statute was wisely conceived and exactly worded. But it is no longer necessary to place reliance on this presumption. The statute has been in force in a number of states for more than ten years. It has governed during that time the numberless mercantile transactions which have arisen in these states. It has not promoted litigation, and when questions have arisen under it, they have proved susceptible of exact determination.

As to the effect upon local jurisprudence, some examination of the situation in each state is doubtless desirable. But it has been found generally, by states which have enacted it, that the changes requisite to produce uniformity are not of serious import, and that the statute when enacted fits readily into the jurisprudence of the state. The single provision of the statute which has perhaps proved more nearly an exception to this rule than any other, is Section 4, which codifies the Statute of Frauds relating to the sale of goods. Prior to the enactment of the statute about two-thirds of the United States had a section of the Statute of Frauds covering sales and contracts to sell goods. About one-third of the states had no such section. Those states which had such a statute generally fixed the minimum value of the goods in question necessary to bring a transaction within the scope of the statute at \$50, though this amount was not uniform. It had been arrived at by roughly translating the sum of 10 pounds fixed by the English statute, passed in the reign of Charles II.

In order to make a uniform provision, the Conference of Commissioners endeavored to strike an average between the law of those states which had a statutory provision and those which had no such statute. It seemed the more reasonable to raise the statutory amount to \$500 because it is probable that that sum is today more nearly an accurate translation of the value of 10 pounds in the reign of Charles II than the sum of \$50. Moreover, it seemed intrinsically reasonable that transactions involving so large an amount as \$500 should be proved by written evidence. Reasonable business usage would seem to require this. On the other hand, fixing the amount at that sum renders the provision less susceptible to the charge which has sometimes been made against the section of the Statute of Frauds, relating to the sale of goods, that it promotes rather than prevents fraud. Small transactions involving less than \$500 are made valid though oral.

#### SUPPORT

The work of the National Conference is supported at this time by voluntary contributions exclusively. The American Bar Association is the largest contributor. The legislatures of a number of states provide for small annual contributions to the work. In such states provision is also usually made for the payment of the actual traveling expenses of the commissioners. In a state where there is no appropriation, the commissioners pay all of their expenses except those incident to a mid-winter committee meeting, in addition to giving their time, both during the conference and in their offices. The funds available to the conference are expended largely in printing and distributing the proposed drafts, in the payment of expenses



of a stenographic report of the proceedings of the meetings, and in the payment of expenses of the mid-winter committee meetings. It generally becomes necessary for a subject to have more attention given it than the members of its committee can afford. There is employed a specialist. Much good has come from this character of assistance. Such experts are never adequately compensated. There is always a substantial element of patriotism and professional pride in their work. Usually these gentlemen are men of national reputation who receive immeasurably more compensation in private employment than the nominal sums paid them by the National Conference for a similar expenditure of effort. The uncertain and precarious support of the National Conference, and the wide and beneficial results of its work have emphasized the importance of a more certain revenue. At its recent meeting in Detroit, a movement was initiated to secure for it an endowment. The results of this action remain to be seen.

#### UNIFORM STATE LAWS IN TEXAS

Texas is far behind other states in its adoption of uniform state laws. Because of its great size and resources, and its distance from other places, necessity for such legislation has not been brought home. At the present time, however, outside capital is seeking investments in Texas and people from other states are swelling the population of our cities. Our relation with other states may be improved by the adoption of uniform state laws which have already been found to be workable. We now have only two of these acts, the Negotiable Instruments Act, adopted in 1919, and the Warehouse Receipts Act, adopted the same year. It is probable that others may be enacted into law at the next session of the legislature, and this paper is submitted in the hope that all of them will receive the thoughtful consideration of the bar of the state.

*W. M. Crook.*

Beaumont.

## SUGGESTIONS FOR IMPROVING COURT PROCEDURE IN TEXAS

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Under this general heading will appear from time to time pertinent suggestions for improving and speeding up our judicial machinery. Our readers are invited to send in for publication in this department brief, concrete suggestions, or discussions of suggestions made by others. Communications for this department should be sent to Mr. A. H. McKnight, M. K. & T. Ry. Building, Dallas.—Ed.

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### NEEDED JUDICIAL REFORM

For the improvement of the administration of justice in Texas, we need:

1. An amendment to the judiciary article of the state constitution. The machinery provided by the present article is unduly expensive, inefficient and otherwise unsuited to the times. Its defects are fundamental and could not be remedied wholly by legislation. A revision of the constitution is therefore necessary, and the amendment should provide simply that the judicial power of the state shall be vested in a Supreme Court and such other courts as the legislature may from time to time create, leaving it to the legislature to prescribe the details.

2. A new system of courts constructed on the unit basis. Our present courts, especially the district courts, are too independent of each other. There is no adequate means provided for bringing the judges and the cases to be tried together. Some dockets are badly congested, while courts in other places have practically nothing to do. The system needs a head with proper administrative powers and facilities, and there will be lost motion, waste, etc., until this is provided. Then it should be unnecessary to go to the legislature for relief every time there is an accumulation of business in any territory.

3. A substitution of directory for mandatory rules of procedure. This can be brought about in either of two ways: (1) we can vest the rule making power in the Supreme Court, or (2) the courts can treat all rules of procedure, even those made by the legislature, as simply a means to an end and disregard them to the extent necessary to accomplish the desired end. The former method is preferable. A bill providing for this was considered by the last legislature, but failed of passage. It is hoped that the next legislature will see with clearer vision.

4. A change in the method of selecting candidates for judicial office. The primary election system has not worked well in the past. There is no reason to believe that it will work better in the future. The chances are that its defects will become more apparent as our population increases. We need fewer judges and better judges, and we should select candidates for judicial position by the convention method; relieve them from the absurdity of putting out platforms, making extensive campaigns, etc. And when elected, judges should be reasonably compensated and retained in office as long as they are faithful and efficient in the discharge of their duties.

5. A higher standard of the legal profession. Our standard for admission to the bar is too low and we have lawyers in the profession who ought to be weeded out. There is a tendency on the part of the public to judge the profession to a considerable extent by its unworthy members. This is natural and it is not altogether unfair. With the means at hand of raising its standard, the worthy members of the bar are not blameless if without protest they permit unworthy persons to get into the profession or to remain in after their unworthiness is discovered. The bar can be kept clean, cultured, ethical and high-minded, and its members owe it to themselves and to the public to see that this is done.

A careful consideration of all these matters by the legislature at its next session and by the members of the bar in the meantime, is respectfully urged. The people of Texas are entitled to a better brand of justice, and they are now paying entirely too much for that which they get.

*A. H. McKnight.*

Dallas.

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#### DECISIONS OF THE COMMISSION OF APPEALS AS AUTHORITY

No small degree of confidence in the justice of one's complaint is necessary to suggest a change in the practices of our Supreme Court, but the custom now usually followed by it in accepting the recommendations of the Commission of Appeals by approving and entering the "judgment" recommended, but without any recognition, either affirmative or negative, of the "opinion," is one which is distressing to the legal profession generally.

The Supreme Court says that the opinion of the Commission is not the opinion of the Supreme Court unless that opinion is specifically approved by it. *McKenzie v. Withers*, 109 Tex. 255 (1918). In this view, it is supported by the statutes which declare that the

opinion of the Commission shall not be regarded as an authority—a statute about as practical as Mahomet's order to the mountain. Proceeding to a logical, though unfortunate conclusion, it refuses writs of error where sought upon a conflict between a Civil Appeals opinion and a commissioner's opinion. None the less, it says that where a cause has been decided on an opinion by the Commission and a companion cause comes on later, it will simply follow the opinion in the former case by reference to it, thus tacitly admitting what we all know to be the truth, namely, that no legislature or court can declare out of existence the effect as precedent of an opinion of the Commission. Likewise, the Courts of Civil Appeals, on receiving a case reversed by the Supreme Court on the recommendation of the Commission, say that the analysis of the case by the Commission's opinion binds the lower court. *West Lumber Co. v. Landers*, 258 S. W. 227 (Tex. Civ. App., 1924).

Judge McClendon writes to the point in *United Company v. Meredith*, 258 S. W. 550, 557 (Tex. Civ. App., 1923). "Such holding would render the opinions of such doubtful value as to hardly warrant their publication in the SOUTHWESTERN REPORTER. Until further light is shed upon this subject by the Supreme Court, we think the holdings of the Commission which are essential to the judgments adopted are entitled to be regarded as having the express sanction of the Supreme Court and therefore to be followed as authority." And in *U. S. Company v. Summers*, 262 S. W. 247 (Tex. Civ. App., 1924), Judge Pleasants says that the opinion in *McClure v. Insurance Company*, 251 S. W. 80 (a commissioner's opinion), "is none the less binding on the Court of Civil Appeals as authority."

These opinions are probably as far as the Courts of Civil Appeals could go to recognize the existence of a situation which no edict or statute can efface, and "'tis pity, 'tis true, 'tis true, 'tis pity" that it still leaves us in twofold doubt: first, will the Supreme Court continue to say that the commissioners' opinions are nothing, second, what is "essential to the judgment?"

To those of us who try to follow the ruling of the Supreme Court, to advise our clients what is the law, and to follow it in the judgments we render in the lower courts, the path at best is a tortuous one and often dim. This practice contributes to its difficulty.

These opinions of the Commission are published. We are compelled to buy them and they are cited to us in the lower courts. It is no use to attempt to damn them by saying they are nothing. They are the careful conclusions of learned men, thought worthy to draw the same salary as the Supreme Court and to review the opinions of



the Courts of Civil Appeals. How much they say is sound in the view of the Supreme Court and how much is not is a problem which increases with their number. Really, none ought to be received unless formally approved. The Court of Criminal Appeals does this and the Supreme Court ought to. It is not fair to the lawyers, to the lower courts, to the majesty of the established law and to those of our citizens who desire the existence of a general respect for the orderly administration of justice.

Is it an answer or excuse to say that the volume of business in the Supreme Court necessitates this unhappy course? How can the Supreme Court say that the judgment is sound unless it finds the opinion sound? It does not read the record, presumably, or the briefs. To do so would only duplicate and render useless the work of the Commission. It must get its information from the opinion and ought to insist that that opinion be correct, and then officially approve it.

I have heard numerous complaints from the profession about this matter and pass it on, hoping that the Bar Association at its annual meeting may request relief.

*H. S. Lattimore.*

Fort Worth.

# TEXAS LAW REVIEW

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CONTRIBUTORS OF LEADING ARTICLES IN THIS ISSUE.—Edson R. Sunderland is a professor of law in the University of Michigan. He is recognized as one of the country's foremost authorities upon procedure and has written extensively upon it. He delivered a series of lectures upon procedural problems at the University of Texas Law School during March, 1926.

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**TRI-STATE CONVENTION.**—This year's convention of the Texas Bar Association will be exceptional in several respects. It will be held in the spring instead of mid-summer as formerly, will be a joint meeting with the associations of Louisiana and Arkansas, and a program of unusual importance will be presented, including addresses by Henry P. Dart for Louisiana, Mr. Chief Justice McCulloch for Arkansas, and former Attorney General Gregory for Texas, and by two guests, President Long of the American Bar Association and Senator Walsh of Montana. The occasion is reminiscent of the joint meeting of the bars of Arkansas and Texas twenty years ago, in the program of which participated Selden P. Spencer, U. M. Rose, and Mr. Justice Brewer. The profession has continually counted that the most worth-while convention in the history of the Texas association.

As in that instance, Texarkana will be host. Three days beginning April 22d will be devoted to the joint program, with separate meetings meanwhile to dispose of individual business of the respective associations. Entertainment on the part of the local bar will include a reception on the evening of April 22d and a banquet on that of the 24th, presided over by United States Judge W. L. Estes of Texarkana.

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**APPORTIONMENT OF OIL ROYALTIES—ARE THE TEXAS DECISIONS CONSISTENT?**—In a situation where the owner of a tract of land has executed an oil and gas lease thereon, and subsequent to the lease but prior to development, has sold or devised the land in parcels to several persons, without reference to the royalty retained under the lease, the division of such royalty becomes a difficult problem. It is held in all jurisdictions that the purchaser of the whole tract under lease gets the royalty arising therefrom, even though no reference is made to it in the deed.<sup>1</sup> There are two recognized solutions of the stated problems: (1) allowing the owner of each tract to receive only the royalty produced from the wells thereon; (2) allowing the owners of all the tracts to participate in the whole royalty on a pro rata basis. It is not of much moment which solution the courts of a given jurisdiction approve, for it cannot be said that either solution is indisputably correct and just, and the other indisputably wrong and unjust. But it is very material that the solution which is adopted be consistent with the theory of oil and gas property rights worked out in such jurisdiction.

In *Gillette v. Mitchell*,<sup>2</sup> the first Texas case of this nature, the Galveston Court of Civil Appeals permitted all the devisees to share in the royalty received from oil produced upon the tract of but one devisee. The question was next presented to the San Antonio Court of Civil Appeals in *Hoffman v. Magnolia Petroleum Co.*,<sup>3</sup> and the

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<sup>1</sup>*Robinson v. Jacobs*, 113 Tex. 231, 254 S. W. 309 (1923); *Caruthers v. Leonard*, 254 S. W. 779 (Tex. Comm. App., 1923).

<sup>2</sup>214 S. W. 619 (Tex. Civ. App., 1918).

<sup>3</sup>260 S. W. 950 (Tex. Civ. App., 1924).

opposite result was reached, but the court's decision was based upon the language of the lease there involved, it not being necessary to pass upon the apportionment of royalty rule. The Supreme Court approved the holding of the Commission of Appeals, reversing the decision of the San Antonio court, but the judgment of reversal was on another question.<sup>4</sup> However, the court's language indicates its approval of the rule announced in *Gillette v. Mitchell*.<sup>5</sup> The Supreme Court has more recently approved an opinion by the Commission of Appeals in *Japhet v. McRae*,<sup>6</sup> in which the question of apportionment was directly passed upon. The Galveston Court of Civil Appeals had held in this case that royalty should be apportioned pro-ratably among the several owners,<sup>7</sup> thoroughly consistent with its prior decision in *Gillette v. Mitchell*.<sup>8</sup> The Commission of Appeals reversed and rendered, holding that the owner of each tract is entitled to all the royalty from the production had upon his particular tract, and denied the plaintiff, who had no production upon his own tract, the right to share in production from defendant's tract. In so holding, the court was guided and controlled by two commendable determinants: first, the weight of authority in other jurisdictions; second, the justice of the case. As pointed out by the court, this result is reached in similar cases by the courts of Arkansas,<sup>9</sup> Indiana,<sup>10</sup> Ohio,<sup>11</sup> Oklahoma,<sup>12</sup> and West Virginia,<sup>13</sup> and the opposite result is reached only in Pennsylvania.<sup>14</sup> The court concludes that justice is more nearly reached by this solution. But, in building its argument, the court pays surprisingly little attention to the Texas theory of ownership of oil and gas in place<sup>15</sup> and to the interest passed under an oil and gas lease in

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<sup>4</sup>Hoffman v. Magnolia Petroleum Co., 273 S. W. 828 (Tex. Comm. App., 1925).

<sup>5</sup>Note 2, *supra*.

<sup>6</sup>276 S. W. 669 (Tex. Comm. App., 1925).

<sup>7</sup>McRae v. Japhet, 269 S. W. 829 (Tex. Civ. App., 1925).

<sup>8</sup>Note 2, *supra*.

<sup>9</sup>Osborn v. Arkansas Territorial Oil & Gas Co., 103 Ark. 175, 146 S. W. 122 (1912).

<sup>10</sup>Fairbanks v. Warrum, 56 Ina. App. 339, 104 N. E. 983 (1914).

<sup>11</sup>Northwestern Ohio Natural Gas Co. v. Ullery, 68 Ohio St. 259, 67 N. E. 494 (1903).

<sup>12</sup>Kimbley v. Luckey, 72 Okla. 217, 179 Pac. 928 (1919); Pierce Oil Corp. v. Schacht, 75 Okla. 101, 181 Pac. 131 (1919); Galt v. Metscher, 103 Okla. 271, 229 Pac. 522 (1924); Gypsy Oil Co. v. Schonwald, 107 Okla. 253, 231 Pac. 864 (1924).

<sup>13</sup>Pittsburgh & West Virginia Gas Co. v. Ankrom, 83 W. Va. 81, 97 S. E. 593, 5 A. L. R. 1157 (1918); Musgrave v. Musgrave, 86 W. Va. 119, 103 S. E. 302, 16 A. L. R. 564 (1920).

<sup>14</sup>Wettengel v. Gormley, 160 Pa. 559, 28 Atl. 934, 40 Am. St. Rep. 733, 18 Mor. Min. Rep. 93 (1894); second appeal 184 Pa. 354 (1898).

<sup>15</sup>Texas Co. v. Daugherty, 107 Tex. 226, 176 S. W. 717, L. R. A. 1917F, 989 (1915); Stephens Co. v. Mid-Kan. O. & G. Co., 113 Tex. 160, 254 S. W. 290, 29 A. L. R. 566 (1923).



this state.<sup>16</sup> In the cases from other jurisdictions, cited by the Texas court, the consideration of such theories is made the very heart of the decisions.

When choosing a rule of decision for a given jurisdiction from two or more solutions of a given contract problem, generally speaking, three important factors should be considered: first, the intent of the parties; second, justice; and third, consistency with previously announced rules of law in that jurisdiction.

The intent of the parties in the situation under discussion could not be found, in absence of some expression in the contract involved. If this intent be expressed, it will be carried out. Hence, the only cases that give any difficulty are those where the parties have indicated no intent, and the courts are called upon to furnish a rule to govern the transaction. So this consideration gives no aid.

Any inquiry based on equitable principles or "natural justice" is equally barren of results. Hardships will result from any solution adopted. In *Japhet v. McKae*<sup>17</sup> the court said the assignee expected to get the royalty coming from the tract at the time the instrument was executed, and that he would have seriously objected had he learned that he would not receive it. Would this assignee have made this contention had production been had upon the land of another assignee? It does not seem safe to build law upon the expectation of a party, expressed after it has been determined which intent is the more profitable. It does not seem that the assignee could have reasonably expected more than he was entitled to under the law. When this instrument was executed, the only judicial expression in this state was to the effect that he would not receive all the royalty accruing from the oil produced on his own tract, but would have to share it with the other assignees or devisees.<sup>18</sup> The Texas court further reasons that apportionment is unjust because it forces upon the lessee who took under a single lease and who owed the duty of accounting to but one lessor, the additional burden of accounting to several assignees of that lessor. Some of the authorities upon which the court draws have thought that this additional burden was impliedly, if not expressly, provided for inasmuch as the usual and now commercial form of lease extends to "heirs, executors, and assigns."<sup>19</sup> A forceful case put by the Texas court is that of 1,000,000 acres belonging to one owner and under a single lease, later subdivided and production had upon one 75-acre tract. The court presents a warning against the impractical result from a decision permitting the owner of the 75-acre tract to have only 75/1,000,000 of the royalty from production wholly upon his own land. Admittedly, that is a case of hardship, but would not often arise. A more probable hardship would be this case: A, owner of 3000 acres, leases the whole to B. Subsequent to the lease,

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<sup>16</sup>Cases cited in note 15, *supra*.

<sup>17</sup>Note 6, *supra*.

<sup>18</sup>*Gillette v. Mitchell*, note 2, *supra*.

<sup>19</sup>*Northwestern Ohio Natural Gas Co. v. Ullery*, note 11, *supra*. But this view was not taken in *Hoffman v. Magnolia Petroleum Co.*, note 4, *supra*.

but prior to development, A devises to his three children, X, Y, and Z. Development is had upon X's tract, and under the apportionment rule all share therein. Production fails and the lease is surrendered. Ten years later, Y leases his land and production is had thereon. Y alone shares this royalty, although he was previously permitted to share in the earlier production of X, toward which he contributed nothing. "This is surely not an equitable result, but one which not only may, but probably will flow from the application of the apportionment doctrine."<sup>20</sup> But a constantly threatening situation, where the non-apportionment doctrine prevails, easily counterbalances all possibilities of hardship which might arise under the apportionment doctrine. Under a single lease, the lessee has the right to develop *any part of the entire leased area*.<sup>21</sup> Suppose the land has been so divided that A and B have contiguous tracts for a distance of 1000 yards. Development is had upon A's tract near the boundary with B's. Tests located away from the boundary get lighter production; those closer get heavier production, thus evidencing that the boundary between the tracts is the middle of the field. All authorities recognize that oil is migratory when the oil strata is penetrated,<sup>22</sup> and all recognize that oil which lies beneath B's land can thus be drawn through the wells on A's land.<sup>23</sup> B is helpless under this supposed fact case. B cannot develop. He cannot force the lessee to develop his (B's) tract. The lessee has the privilege of drilling where he will. Go so far as to suppose collusion between A and the lessee, and what remedy would B have? It is believed that he would have none,<sup>24</sup> and yet, the evidence is almost conclusive that B's land is being drained of its oil. A greater case of hardship and injustice could hardly be supposed.<sup>25</sup> And thus, for each hardship found under one rule, one so nearly equaling it—or even exceeding it—can be found under the other, that a decision of the question on this basis can hardly be deemed sufficient and satisfactory.

Is the solution adopted by the Texas court consistent with its previous decisions in the law of oil and gas?

As said by Mr. Veasey,<sup>26</sup> "while commentators refer to this branch of jurisprudence as the 'Law of Oil and Gas,' it is more exact to say that we are dealing with the law pertaining to oil and gas leases. This is true because the oil and gas lease characterizes the subject through-

<sup>20</sup>Ritz's dissent, *Campbell v. Lynch*, 81 W. Va. 374, 94 S. E. 739, L. R. A. 1918B, 1070.

<sup>21</sup>*Osborn v. Arkansas Territorial Oil & Gas Co.*, note 9, *supra*.

<sup>22</sup>*Hague v. Wheeler*, 157 Pa. 324, 27 Atl. 714 (1893); *Fairbanks v. Warrum*, note 10, *supra*; *Texas Co. v. Daugherty*, note 15, *supra*.

<sup>23</sup>18 MICH. L. REV. 452, 453 and cases cited.

<sup>24</sup>In a similar situation of hardship in *Stephenson v. Glass*, note 59, *ante*, the court suggested no relief.

<sup>25</sup>The Texas off-setting statute (REV. CIV. STAT. 1925, Art. 6029) and the regulations announced by the Oil and Gas Division of the Texas Railroad Commission have no application to this case.

<sup>26</sup>18 MICH. L. REV. 652.

out." It is now generally recognized that oil and gas are minerals<sup>27</sup> and are part of the realty while in place,<sup>28</sup> but become personalty when reduced to possession or brought to the surface.<sup>29</sup> It is also well recognized that the owner of the surface is the owner of the oil and gas in place, to some degree, whether it be "qualified ownership"<sup>30</sup> or "absolute ownership."<sup>31</sup> This concept of ownership is different from that which generally obtains because the owner of the surface has no right of action against the adjoining owner for draining his oil away.<sup>32</sup> His only remedy is to produce in self-defense.<sup>33</sup> The owner of the surface has the right to extract the oil therefrom, and when reduced to possession, he has absolute ownership thereof.<sup>34</sup> He also has the right to lease the land for such development, but oil and gas being realty, a conveyance of them in the earth requires all the formalities of a conveyance of any other interest in the same real estate.<sup>35</sup> The lease may be in either of three forms:<sup>36</sup> (1) a grant of the exclusive right to mine and produce, with possession of so much of the land as is necessary for that purpose; (2) a grant of the land itself for the purpose of mining for oil; or (3) a conveyance of the oil and gas, with the right to enter and mine therefor. In the early history of oil and gas litigation the courts distinguished between these types of leases as to the interest or right conveyed thereby and thereunder.<sup>37</sup> The Supreme Court of Texas has recently held that all three types of leases pass identically the same interest.<sup>38</sup> This is a bold step, but thoroughly sound. It conforms to the interpretation of laymen, generally. And while it does some violence to legal terminology, such is not to be regretted when so much confusion has made useless the nice distinctions of the common law classification of real property. But giving to all leases the same meaning is not a determination of what interest is passed by an oil and gas lease. It is at this point that the value of the Texas decision<sup>39</sup> ceases.

What interest is passed by an oil and gas lease? Is it a mere right

<sup>27</sup>THORNTON ON OIL AND GAS, Sec. 18; Texas Co. v. Daugherty, note 15, *supra*.

<sup>28</sup>Murray v. Allred, 100 Tenn. 100, 43 S. W. 355, 39 L. R. A. 249, 66 Am. St. Rep. 740 (1897); Pittsburgh & W. Va. Gas Co. v. Ankrom, note 13, *supra*.

<sup>29</sup>Osborn v. Arkansas Territorial Oil & Gas Co., note 9, *supra*.

<sup>30</sup>Fairbanks v. Warrum, note 10, *supra*.

<sup>31</sup>Texas Co. v. Daugherty and Stephens Co. v. Mid-Kan. Co., note 15, *supra*.

<sup>32</sup>1 TEXAS LAW REVIEW 168-170, and cases there cited.

<sup>33</sup>Higgins Oil & Fuel Co. v. Guaranty Oil Co., 145 La. 234, 82 So. 206 (1919).

<sup>34</sup>27 W. VA. LAW QUAR. 290.

<sup>35</sup>THORNTON ON OIL AND GAS, Secs. 19, 20; Texas Co. v. Daugherty, note 15, *supra*.

<sup>36</sup>18 MICH. L. REV. 749; Stephens Co. v. Mid-Kan. Oil Co., note 15, *supra*.

<sup>37</sup>Texas Co. v. Daugherty, note 15, *supra*.

<sup>38</sup>Stephens Co. v. Mid-Kan. Oil & Gas Co., note 15, *supra*.

<sup>39</sup>*Ibid*.

to explore? or a license? or an incorporeal hereditament? or an estate in possession? or a determinable fee? or some other kind of common law interest? The courts have answered this question in as many different ways as there are legal terms available in the common law classification of real property interests to name it. *Does it matter whether or not it is any of these?* To determine what interest passes under such a lease is not within the purview of this paper. The question is merely raised to suggest the real problem before the court in the solution of the question under consideration, and to suggest, further, that the courts have seemingly spent their efforts in trying to find a suitable common law name for the interest which has passed, instead of deciding on the facts before the court *what interest has actually passed*. Having found and applied the name, they have thereby given their decision.

When the courts of a given jurisdiction have determined the theory of ownership of oil and gas that will obtain in that jurisdiction, the opinions themselves bear testimony that they have, at the same stroke, determined what interest passed under an oil and gas lease. Whether or not a decision of the former is necessarily a decision of the latter is not asserted, but a reference to the cases evidences that it is practically so. But it is asserted that when the courts of a given jurisdiction have said what interest passes under an oil and gas lease, they have *necessarily determined* which solution of the problem under discussion they will adopt. A reference to the cases of other jurisdictions indicates that those courts have so considered it.

In *Osborn v. Arkansas Territorial Oil and Gas Co.*<sup>49</sup> the Supreme Court of Arkansas denied apportionment. A careful reading of that decision evidences that the court felt that it was *bound* by the law of that jurisdiction relative to ownership of oil and gas, and the interest passed by a lease:

A gas lease . . . is a contract granting to the lessee the right to explore the land, and to produce therefrom the gas therein discovered. It is not a present sale or transfer of title to the gas, but, on account of its vagrant nature, the gas does not become actually owned until actually possessed. . . . There is not granted by such lease an interest in the land, and a contingent sale only of the gas is thereby made.

As the owner of the land continued to own the oil and gas thereunder after the lease was made, the court consistently held:

. . . By a conveyance of a tract of land with no reservation therein the grantee obtains title to all the natural gas that exists in and is captured beneath the surface thereof. . . . We are of opinion that the fact that the lease was executed before the conveyance to the trustees of the church did not alter or lessen their right of ownership of the gas, which was a part of the realty granted to them. . . . The tracts are owned separately, and not in common by the parties, and therefore each

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<sup>49</sup>Note 9, *supra*.



party owns, respectively, the gas discovered and captured on their respective tracts, and do not own the gas in common.

In *Fairbanks v. Warrum*,<sup>41</sup> the Indiana court likewise held that each owner was entitled to all the royalty from the oil produced on his land. As to the ownership of oil and gas, this court, moved by its conception of the fugitive, transitory nature of oil and gas, holds to the theory of "qualified ownership." This "qualified ownership" of oil and gas merely entitles the owner of the surface to the right to reduce it to possession, or to grant that right to someone else. Considering the lease and the interest passed thereunder, the court said:

The lease which we are considering did not, by its terms, convey to the lessee and his assigns any title to said gas under the tract, but rather created in said lessee and his assigns the right to reduce it to possession by the means aforesaid. . . . Until such gas should be so reduced to possession by said lessee or his assigns, said qualified ownership remained in said Noble Warrum, subject to the lessee's right to explore for it and reduce it to possession. . . . There remained in Noble Warrum, as an incident to the ownership of the land, only the right to receive acreage and well rentals under the lease. . . . By said deed said Noble Warrum parted with the entire title to said 58 acres, including everything that constituted the realty.

In *Northwestern Ohio Natural Gas Co. v. Ullery*,<sup>42</sup> the Supreme Court of Ohio, after concluding that the question of divisibility of rents was not controlling, expressly disapproved the doctrine of *Wettengel v. Gormley*,<sup>43</sup> and adopted non-apportionment as the rule of decision in that state. This holding is based consistently on the doctrine that oil and gas are not the subject of ownership until reduced to possession, and that an oil and gas lease conveys only the right to explore for, and when found, to extract, the oil and gas. Hence, the execution of the lease did not divest the owner of the surface of title to the oil and gas, and when he conveyed the surface, he also conveyed such rights as he had to the oil and gas, as an incident to his ownership of the surface. The Oklahoma doctrine is clearly expressed in this extract from the opinion in *Kimbley v. Luckey*:<sup>44</sup>

The oil and gas under the 160 acres of land belonged to the Luckeys, subject only to the license or lease, so called, held by Lambert, to explore for oil and gas and produce the same when discovered. When there was carved out of the tract and conveyed to Alexander and his co-tenants a portion of the lands, they pro tanto succeeded to the interest of the

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<sup>41</sup>Note 10, *supra*.

<sup>42</sup>Note 11, *supra*.

<sup>43</sup>Note 14, *supra*.

<sup>44</sup>Note 12, *supra*.

Luckeys, not only in the fee, but in the oil and gas produced on the 40-acre tract.

*Pierce Oil Corporation v. Schacht*, *Galt v. Metzcher* and *Gypsy Oil Co. v. Schonwald*,<sup>45</sup> all later expressions of the Oklahoma court, in so far as they deal with the question here treated, expressly approve the doctrine of *Kimbley v. Luckey*, add nothing new, and hence require no further consideration. The Supreme Court of West Virginia several times divided on the question, and no better expression of the two views has been found than the opposing opinions of Ritz and Poffenbarger. In *Pittsburg and West Virginia Gas Co. v. Ankrom*,<sup>46</sup> Ritz, J., speaking for the court, said:

What, then, was the interest purchased by each of these defendants? The oil and gas lease, it must be borne in mind, did not pass title to anything to the lessee. It simply conferred the privilege of going upon the land and exploring for oil and gas, and removing the same if discovered. Then, at the time of the sale of these respective tracts of land by the trustee, the purchasers acquired everything that Collins had theretofore owned in the respective tracts so purchased, including oil and gas.

In *Musgrave v. Musgrave*,<sup>47</sup> the same court, speaking again through Ritz, J., said:

We think the determination of this case depends upon the answer to the question: What did John J. Musgrave own at the time of his death? He was the owner of the whole 355 acres of land, subject only to the right of the lessee in the oil and gas lease to develop the same for oil. It has been repeatedly held by this court that the holder of an oil and gas lease has no vested estate in the oil and gas in place until development has been had upon the land, and oil and gas produced. At his death each of his children took every interest in the parcel of land assigned to him, respectively, that John J. Musgrave had therein. It cannot be doubted that he (Musgrave) was the owner of the oil and gas underlying the land at the time of his death.

In the above cases, Poffenbarger dissented, his opinions being at once the most extensive and logical statement of the apportionment theory. An analysis of his opinion in the *Musgrave Case* shows it to be built upon the following propositions: (1) The execution of the lease brought into being an estate in the land which had not theretofore existed—the royalty in the oil and gas; (2) when the land was divided, the royalty was not, because it was then a separate estate in the hands of the vendor; (3) this royalty is a payment, estate, or incorporeal hereditament, in the nature of rent—but not technically rent—arising from the whole land, and hence due to

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<sup>45</sup>Note 12, *supra*.

<sup>46</sup>Note 13, *supra*.

<sup>47</sup>Note 13, *supra*.

the whole; (4) when the leased lands are divided among several parties, the rents arising therefrom will also be divided in the proportion that the number of acres held by each bears to the whole—the rents passing to the assignees or devisees as an incident to the reversion which the lessor had retained and passed to them. The opinion expressly approves *Wettengel v. Gormley*. That case held that the lease created such a severance of the mineral rights from the fee that after its execution, not only did the lessee have an estate in the land separate from the fee, but the fee owner himself had an estate independent of the fee—an estate in the prospective royalties. The latter estate, being so separated from the fee, did not merge in the devise thereof, but since no mention of it was made in the will, it descended as intestate property, and, therefore, went equally to the three sons.

It is noticeable that in each of the cases dealing with this problem, cited from other jurisdictions by the Texas court and here reviewed, it has not been necessary to go outside the language of that particular case to learn the law in that jurisdiction upon the question of ownership of oil and gas and the interest passed under an oil and gas lease. In each case the solution of the apportionment problem is based *expressly* upon the previously announced rule of ownership and the interest passed under a lease. The result reached is a logical one, built upon consecutive legal propositions.

Hence it will be observed that every case drawn upon as authority by the Texas court in its opinion in *Japhet v. McRae* has been decided upon a *consideration of the interest passed by an oil and gas lease*. Whether the *result* reached was apportionment or non-apportionment, the decision was based upon, and was consistent with, the law in that jurisdiction concerning the interest passed under an oil and gas lease. It will be further observed that in each jurisdiction where an oil and gas lease has been held to pass an interest or estate in the land, or to effect a separation of the oil and gas from the surface estate, the court has held that the rule of apportionment applies. On the other hand, in each jurisdiction where an oil and gas lease is held to pass to the lessee only the right to explore for oil and gas and to mine it when found, but not to effect a separation of the oil and gas from the fee, the court has adopted the rule of non-apportionment.

Now for a more critical analysis of the Texas cases in the light of the decisions above. In *Gillette v. Mitchell*,<sup>48</sup> the court, in announcing the apportionment doctrine, expressly approves *Wettengel v. Gormley*, and then unhappily says: "We do not think these decisions (*Texas Co. v. Daugherty*<sup>49</sup> and kindred cases) are controlling upon the question presented in this case." The court seemingly thought it necessary to avoid the decision in *Texas Co. v. Daugherty*, when, as a matter of fact, that case, laying down the doctrine of "absolute ownership" and that a lease passes an estate

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<sup>48</sup>Note 2, *supra*.

<sup>49</sup>Note 15, *supra*.

in the land, furnished the basis for the decision reached in *Gillette v. Mitchell*. Apportionment is the only consistent result that could have been reached, but since the court disregarded the true basis for its decision its reasoning does not seem sound. It is true that the *Daugherty Case* is limited to one type of lease, while the *Gillette-Mitchell Case* involves another type, but the court in the latter case does not intimate that the difference in the form of the lease is the reason for its not thinking the decision in the *Daugherty Case* controlling. But, even if this distinction in leases could have been the reason for the court, in deciding the *Gillette Case*, not feeling that it was bound by the *Daugherty Decision*, no such reason is available to the court that has recently decided *Japhet v. McRae*, for, intervening between the two decisions is the decision in *Stephens County v. Mid-Kansas Oil and Gas Co.*, that all leases pass the same interest, to wit: a determinable fee, thus making certain the only uncertainty left by the *Daugherty Case*.

What is the basis of the decision in *Japhet v. McRae*? No express reference is made to either *Texas Co. v. Daugherty* or *Stephens County v. Mid-Kansas Oil and Gas Co.* The court says, "This is a case where it is contended that the law itself, in the absence of contract to the contrary, requires an apportionment of the one-eighth royalty." The only material mention of the lease is in this language:

If the rule we approve is just in all the other states where it is followed, it is also just in Texas. *We are not unlike the other states in any matter of substance which affects this matter.* (These italics mine.) Our Supreme Court has held that oil is a part of the realty until brought to the surface and that it can be sold *in place*. Japhet unquestionably bought the realty in the ten acres. He bought one-eighth of the oil in or under the land. The lessee had the right to take full charge of the land so far as is necessary to get the oil from under it. He had the title to the oil for that purpose. But, when it was brought to the surface, Japhet had his right to the one-eighth thereof. He had an equitable title to his interest in that oil and if the lessee had made any effort to take it away from him, Japhet would have been entitled to sue him for conversion of his property.

An analysis of this language shows the following inconsistencies: (1) The court has overlooked the fundamental difference in theory respecting ownership of oil and gas in place. While the court here reannounces the doctrine of "absolute ownership," the states from which authority is drawn hold to the contrary. (2) Under *Texas Co. v. Daugherty* and *Stephens County v. Mid-Kansas Oil and Gas Co.* the lessee acquires a determinable fee in all the oil in and under the ground, while in the jurisdictions drawn on, he gets only the right to explore. (3) Under the decisions of our Supreme Court, the lessor's royalty interest is nothing more than a contract right inasmuch as the lessee becomes owner of all oil and gas in place, while in the jurisdictions drawn on, the lessor retains whatever title he originally had in the oil and gas. (4) The court holds that



Japhet bought the realty in 10 acres. "He bought one-eighth of all the oil in and under the land." The court must have forgotten that under the Texas theory of ownership this interest had already passed to the lessee, and all that the lessor had and could have sold Japhet, in so far as the oil and gas was concerned, was his contract right to receive royalty, and his possibility of reverter.<sup>50</sup> (5) It may be true, loosely speaking, that Japhet, having purchased the one-eighth royalty interest, "had equitable title thereto"—even more than this—he *had a contract right thereto*, but it does not follow that if the lessee had failed to account he would have been guilty of converting Japhet's property. On the other hand, said lessee would have been liable *only* for damages for breach of contract. The Supreme Court having decisively held that an oil and gas lease conveys to the lessee *title to all the oil and gas in place*,<sup>51</sup> it would be a contradiction of terms to say that the lessor retains any interest in the oil and gas other than a mere contract right against the lessee to receive a certain royalty upon production, unless by the express terms of the lease, such interest has been excepted. It has previously been shown that this lease contains no such exception.<sup>52</sup>

The only possible verdict of one who reads the cases is that the Texas decisions are in conflict—that the recent decision on apportionment is contrary to the predicate decisions on ownership and the interest passed under an oil and gas lease. As a matter of fact, can the present state of Texas law be properly termed other than that of *indecision*?

It does not matter so much whether a given jurisdiction has adopted the theory of ownership, or non-ownership; whether it has said that a lease conveys an estate in the land, or only a contract right to explore and then to extract in case of discovery; or whether it has announced the rule of apportionment or non-apportionment. But it does matter that, having announced the one, it announces all the others with such consistency as not to disturb property and contract rights which have become vested. Moreover, inconsistent decisions are not conducive to a rational jurisprudence.<sup>53</sup>

Lewis Jeffrey.

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<sup>50</sup>*Caruthers v. Leonard*, 254 S. W. 779 (Tex. Comm. App., 1923). The lease and the contract for rental and royalty involved in *Japhet v. McRae* is identical with that in *Caruthers v. Leonard*. In neither lease is there a reservation of one-eighth the oil to the lessor. The instrument conveys "all the oil, gas and sulphur" in or under the premises, "subject to the royalties hereinafter mentioned." This exception, when mentioned, is described to be "a quantity equal to one-eighth of all the oil produced and saved."

<sup>51</sup>*Texas Co. v. Daugherty and Stephens Co. v. Mid-Kan. Co.*, note 15, *supra*.

<sup>52</sup>Note 54, *supra*.

<sup>53</sup>Since the above comment was written, the San Antonio Court of Civil Appeals has rendered a decision in *Stephenson v. Glass*, 276 S. W. 1110, in which, by way of dictum, it expressly disapproves the result reached and the rule announced in *Japhet v. McRae*, and purports to follow *Hoffman v. Magnolia Petroleum Co.* The value of the instant case is to indicate the present state of Texas oil and gas law on the question of apportionment, and to indicate further, the reluctance of the courts to follow *Japhet v. McRae*.

THE EFFECT OF THE DECISION IN THE ARCHER COUNTY CASE AND A SUGGESTED REMEDY.—The recent decision of the Supreme Court of the United States in the case of *Browning v. Hooper*,<sup>1</sup> popularly referred to as the *Archer County Case*, has placed in doubt the validity of the bonds issued by special road districts created under the provisions of Articles 627 to 637, inclusive, of the REVISED CIVIL STATUTES OF TEXAS.<sup>2</sup>

The case arose in a suit in the Federal District Court by the owners of land included in Road District No. 2 of Archer County against the officers of the county to restrain the issuance or sale of bonds of the special district and to restrain the levy or collection of any tax upon their property to pay any part of the interest or principal of the bonds. The plaintiffs introduced evidence that the improvement of the designated roads of the district would result in practically no benefit to their lands or convenience to themselves, and asserted the invalidity of the statute under which the district was created on account of its repugnance to the "due process" clause of the Fourteenth Amendment to the Federal Constitution.

The Supreme Court held, reversing the decree of the district court denying the injunction,<sup>3</sup> that: (1) the determination of the land to be included in the district and the amount of the bond issue, having been made by the petitioners for the election authorizing the issuance of the bonds, did not amount to a legislative determination of the land to be benefited or the tax to be levied; (2) the determination of these matters by the signers of the petition should be treated in the same way as the determination of them by an administrative board. The rule requiring a hearing upon the question of benefit and apportionment when the special assessment district is created by an administrative board was applied and the statute held unconstitutional under the "due process" clause of the Fourteenth Amendment.

When a local improvement district is defined and the burden fixed by a special act of the state legislature or by the legislative body of a municipality to which full legislative power over the subject has been granted, it is conceived that the property owners have had a hearing upon the question of benefit through their elected representatives and no rights guaranteed under the "due process" clause have been interfered with,<sup>4</sup> unless the legislative act is palpably arbitrary and a clear abuse of authority.<sup>5</sup> In cases in which the district and the amount of the total burden have been fixed by the

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<sup>1</sup>46 Sup. Ct. 141, 70 L. Ed. (Adv. 153) (1926).

<sup>2</sup>REV. STAT. 1925, Arts. 726-752; COMP. TEX. STAT. 1920, and VERNON'S ANN. CIV. STAT. TEX. 1914, Arts. 627-637.

<sup>3</sup>33 Fed. (2d) 160 (1925).

<sup>4</sup>Mo. Pac. Ry. v. West Crawford Road Dist., 266 U. S. 187, 69 L. Ed. 74, 45 Sup. Ct. 31 (1924). Withnell v. Ruecking Con. Co., 249 U. S. 63, 63 L. Ed. 479, 39 Sup. Ct. 200 (1918).

<sup>5</sup>Myles Salt Co. v. Iberia & St. Mary's Drainage Dist., 239 U. S. 478, 60 L. Ed. 392, 36 Sup. Ct. 204 (1916).

legislature and the apportionment left to be made by an administrative board, a hearing must be had as to the relative amounts to be borne by the different parcels of property within the district.<sup>9</sup> However, the burden may also be apportioned by the legislature on the ad valorem basis and the right to all notice and hearing dispensed with.<sup>7</sup>

If it is granted that the steps taken in creating the district considered in the *Archer County Case* were not steps in a purely ministerial execution of a legislative act, which, obviously, they were not, the decision in that case is well supported by authority. It has been uniformly held that "due process of law" demands that there be a notice and hearing upon the matters of benefit and apportionment when they are determined by an administrative board.<sup>8</sup>

But how does the decision affect bonds already sold by other road districts similarly organized under the same statute? The court plainly held that the statute under which the Archer County district was formed was unconstitutional. So far as the Federal courts are bound by precedent they would hold that the "unconstitutional act is not law; it confers no rights; it imposes no duties; it affords no protection; it creates no office; it is in legal contemplation as inoperative as though it had never been passed."<sup>9</sup> Apparently the courts of Texas would take the same attitude.<sup>10</sup> Whatever may be said of the effect of the decision, it is at least a precedent binding on all courts in adjudicating the rights under the Texas special road district statute.

The citizens of Texas who have received the benefits from the sale of the bonds are anxious that the rights of the bondholders be made secure. But how may this be accomplished? Apparently the remedy must be supplied through some new legislative sanction which is agreeable to the Constitution of the United States and of the State.

#### I.

The Federal Constitution as interpreted by the Supreme Court presents no barriers to curative legislation. In the case of *Spencer v. Merchant*,<sup>11</sup> a street assessment levied under an unconstitutional statute had not been paid by some of the land owners upon the street. The state legislature passed a special act providing that the isolated parcels upon which the assessment had not been paid should

<sup>9</sup>*Spencer v. Merchant*, 125 U. S. 345, 31 L. Ed. 763, 8 Sup. Ct. 921 (1888).

<sup>7</sup>*Kan. City So. v. Road Dist.*, 266 U. S. 379, 69 L. Ed. 142, 45 Sup. Ct. 136 (1924).

<sup>8</sup>*Fallbrook Irr. Dist. v. Bradley*, 164 U. S. 112, 174, 41 L. Ed. 364, 17 Sup. Ct. 56 (1896); *Embree v. Kan. City & L. B. Road Dist.*, 240 U. S. 242, 60 L. Ed. 625, 36 Sup. Ct. 317 (1915).

<sup>9</sup>*Norton v. Shelby Co.*, 118 U. S. 425, 30 L. Ed. 178, 6 Sup. Ct. 1121 (1886); *Lake Co. v. Graham*, 130 U. S. 674, 32 L. Ed. 1065 (1888).

<sup>10</sup>*Nolan County v. The State*, 83 Tex. 182, 17 S. W. 823 (1892).

<sup>11</sup>125 U. S. 345, 31 L. Ed. 763, 8 Sup. Ct. 921 (1888).

pay so much of the original assessment as remained uncollected plus a proportional part of the expense of making the new assessment. The Supreme Court held that the reassessment, not being a palpable abuse of the legislative authority, was not within the prohibition of the Fourteenth Amendment. A like decision was reached in regard to an act of Congress under the Fifth Amendment in *Parsons v. District of Columbia*.<sup>12</sup>

In both of the above cases the apportionment of the burden spread by the legislative act upon the designated parcels of land was left to be made by commissioners after notice and hearing. In the case of *Kansas City So. Ry. v. Road Improvement Dist.*,<sup>13</sup> an assessment against a railroad company was contested on the ground that no benefit was received. The decision of the commissioners upon the benefit and apportionment was upheld by the county court, and pending an appeal to the Supreme Court, the state legislature passed a special act creating a road district with the same boundaries as those fixed by the commissioners, and also providing a tax and an apportionment of the burden identical with that fixed by them. The act was held valid by the Supreme Court. Thus the legislature, within reasonable bounds, may validate the entire void proceedings by incorporating the results reached into a special law. In *Mattingly v. District of Columbia*<sup>14</sup> it was held that an act of Congress ratifying a *totally unauthorized* assessment was a valid enactment under the Fifth Amendment.<sup>15</sup>

Obviously, a general law providing for an administrative assessment after a hearing upon the questions of benefit and apportionment and requiring a reorganization of all defined districts created under the old law in accordance with the terms of the new, would not fall under the ban of the Fourteenth Amendment.

The decisions of the Federal courts all agree that reassessments in any form are not invalid on account of any retroactive effect they might have.<sup>16</sup>

## II.

The State Constitution seems to place some limitations upon the power of the legislature to deal effectively with the situation. The constitutional provisions which may be taken to have some bearing upon the legislative power in this respect will be discussed in connection with the cases construing them.<sup>17</sup>

Art. III, Sec. 52.—. . . Under legislative provision any county, any political subdivision of a county, . . . or any political sub-

<sup>12</sup>170 U. S. 45, 52, 42 L. Ed. 943, 18 Sup. Ct. 521 (1898).

<sup>13</sup>266 U. S. 379, 69 L. Ed. 142, 45 Sup. Ct. 136 (1924).

<sup>14</sup>97 U. S. 687, 24 L. Ed. 1098 (1878).

<sup>15</sup>For a case showing how far the Supreme Court will go in upholding a legislative re-assessment see: *Valley Farms Co. v. Westchester County*, 261 U. S. 155, 67 L. Ed. 585, 43 Sup. Ct. 261 (1922).

<sup>16</sup>*Wagner v. Leser*, 239 U. S. 207, 60 L. Ed. 231, 36 Sup. Ct. 112 (1915).

<sup>17</sup>The relevant parts of the constitution are set out below:



division of the state or any defined district now or hereafter to be described and defined within the State of Texas, and which may or may not include towns, villages or municipal corporations, upon a vote of a two-thirds of the resident property taxpayers . . . may issue bonds or otherwise lend its credit in any amount not to exceed one-fourth of the assessed valuation of the real property of such district or territory . . . and levy and collect such taxes to pay the interest thereon and provide a sinking fund for the redemption thereof, as the legislature may authorize, and in such manner as it may authorize the same, for the following purposes, to wit: . . .

(c) The construction, maintenance and operation of macadamized, graveled or paved roads or turnpikes or in aid thereof.

Art. III, Sec. 56.—The legislature shall not, except as otherwise provided in this constitution, pass any local or special laws. . . .

Authorizing and paying out, opening, altering or maintaining of roads, highways, streets or alleys. . . .

Creating offices, or prescribing the powers and duties of officers in counties, cities, towns, election or school districts.

And in all other cases where a general law can be made applicable, no local or special law shall be enacted. . . .

Art. VIII, Sec. 9.—. . . The legislature may also authorize an additional ad valorem tax to be levied and collected for the maintenance of public roads; provided, that the majority of the qualified property tax-paying voters of the county . . . shall vote for such tax. . . .

And the legislature may pass local laws for the maintenance of the public highways. . . .

The statutory provisions declared unconstitutional in the *Archer County Case* were passed by the legislature in an attempt to exercise power under Section 52 of Article III. It is to be noted that this section is silent as to the procedure to be prescribed by the legislature, and that it may look forward to either a general or special law.

Section 56 of Article III, which limits the power of the legislature in passing local or special laws, will now be discussed in connection with Section 9 of Article VIII, which grants the power to pass local laws for the maintenance of roads. The case of *Commissioners Court of Limestone County v. Garrett*<sup>18</sup> involved the validity of a local law providing a special commission to carry on road improvement in Limestone County. The Commission of Appeals held that the act was unconstitutional in that it was repugnant to Section 56 of Article III because it created offices and prescribed the powers and duties of officers. Although the first paragraph of Section 56 contains the exception: "except as otherwise provided in this constitution," it was held that there was no provision specifically giving the power to create offices in counties and that the general provisions of Section 9 of Article VIII, which gives the legislature power to pass local laws for the maintenance of roads, did not, by implication, include the power to create offices in exercising that power.

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<sup>18</sup>236 S. W. 970 (Tex. Comm. App., 1922).

The Supreme Court, in *Dallas County v. Plowman*,<sup>19</sup> had under consideration a special law extending the powers of Dallas County in the opening of new roads and in their improvement. No offices were created by the act. It was held constitutional under Section 9 of Article VIII, the court saying that the provisions of that section came within the exception in the first paragraph of Section 56 of Article III, and that Section 9 of Article VIII having been adopted in 1907 was cumulative of Section 2 of Article XI, a part of the Constitution of 1876, which provides that ". . . the laying out, construction and repairing of county roads shall be provided for by general law." The last paragraph of Section 56 of Article III, which provides that no local law shall be enacted where a general law can be made applicable, was not regarded as interfering with the special road laws considered in either of the above cases. But in at least one case this provision has been construed rather strictly.<sup>20</sup>

These cases indicate that a special act providing for the construction and maintenance of roads which is applicable to a *whole county* and does not create offices is valid under the State Constitution. The portions of Section 9 of Article VIII which precede the last sentence providing that local laws may be passed for highway improvement, clearly contemplates a general law affecting counties which subscribe to it. If the last sentence is construed in the light of the preceding provisions, it might be held to authorize *only* a special act involving a whole county. However, the provision, if given a liberal construction, would be a clear exception of the power to pass local laws creating defined road districts from the general constitutional limitations upon the legislature.

Does this somewhat limited power to pass local laws for the improvement of roads carry with it the power to create a defined district and make a reassessment such as that considered in *Kansas City So. Ry. v. Road Improvement Dist.*,<sup>21</sup> or *Spencer v. Merchant*?<sup>22</sup> So far as the constitutional provisions discussed above are concerned, the power seems to exist, but the provisions of Section 53 of Article III cast some doubt upon the matter. That section provides:

The legislature shall have no power to . . . pay or authorize the payment of any claim created against any county or municipality of the state under any agreement or contract made without authority of law.

If the view be taken that the bonds issued under the void Texas statute represent *claims* created under such "agreements" or "con-

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<sup>19</sup>99 Tex. 509, 91 S. W. 221 (1906). In this case the word "maintenance" as used in Art. VIII, Sec. 9, was held to include the opening and laying out of roads.

<sup>20</sup>Bell County v. Hall, 105 Tex. 558, 153 S. W. 121 (1913), affirming decision of Civil Appeals, 138 S. W. 178.

<sup>21</sup>266 U. S. 379, 69 L. Ed. 142, 45 Sup. Ct. 136 (1924).

<sup>22</sup>125 U. S. 345, 31 L. Ed. 763, 8 Sup. Ct. 921 (1888).

tracts" as are spoken of in this section, a very different conclusion may be reached as to the legislative power to pass remedial acts. No case construing this clause of Section 53 has been found by the writer, but it is reasonable to believe that the courts would construe it in the light of the preceding provisions which deal with the giving of gratuities to contractors and officers. This section was certainly not intended to prevent the legislature from correcting its mistakes.

In *Nolan County v. The State*,<sup>23</sup> it was held that a general law validating all bonds issued by counties of the State prior to a certain date was constitutional where the bonds affected were void only on account of the lack of legislative sanction for their issuance. This decision would not be authority for the validity of a similar act making the bonds under discussion valid, for the defect is in the creation of the issuing district which can be remedied only by creating them anew under proper procedure. The *Nolan County Case* did not mention Section 53 of Article III, quoted above.

From the above discussion we may suppose that the bondholders' rights may be made secure by special acts creating districts containing land which may reasonably be regarded as benefited by the roads which have been built with the proceeds from the sale of the bonds. The special acts should levy a definite tax sufficient to pay the interest on the bonds and to provide a sinking fund for their payment, and should provide that the district created assume the road bonds previously issued or that it issue new bonds to be exchanged for the old. The tax levied in the special acts would have to be authorized by a two-thirds majority of the voters of the special district as provided in Section 52 of Article III in order that the extended rights of taxation for special road purposes granted therein might be exercised.

Neither the State or Federal Constitutions would be offended by a general law which provided for a hearing before the commissioners court on the matters of benefit and apportionment. Such a law must soon be passed to replace the present special road district act. It might be made to serve the double purpose of providing a safe law for the future and of securing the validity of the present districts by including in it a provision that all defined districts created under the old law should reorganize under its provisions and issue new bonds to be exchanged for the bonds of the old district or assume the obligation of the old bonds.

W. L. Matthews.

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CONTRACTS—COMMUNICATION OF ACCEPTANCE IN BILATERAL CONTRACTS.—How far is it necessary that communication should reach the offeror?

In the case of *International Filler Co. v. Conroe Gin, Ice, and Light Co.*,<sup>1</sup> recently decided by the Commission of Appeals of Texas,

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<sup>23</sup>83 Tex. 182, 17 S. W. 823 (1892).

<sup>1</sup>277 S. W. 631 (Tex. Comm. App., 1925).

the defendant mailed to plaintiff, the International Filter Co., a proposal which contained two provisions relating to the acceptance by plaintiff. One was the declaration that "the offer shall become a contract . . . when approved by an executive officer of the International Filter Co., at its Chicago office." The other is thus stated: "This proposal is submitted for prompt acceptance, and unless so accepted is subject to change without notice." Upon the receipt of the proposal at the Chicago office, the president of plaintiff corporation indorsed thereon, 'O. K. P. N. Engel.' The court held that the indorsement on the buyer's proposal was an acceptance of the offer and that notice of approval was not required to be made to the buyer before the contract was complete. The principle relied upon as the basis of the decision is that if the offeror expressly or impliedly intimates a particular mode of acceptance as sufficient to make the bargain binding, it is only necessary that the other person to whom such offer is made, follow the indicated method of acceptance; and if the person making the offer, expressly or impliedly intimates in his offer that it will be sufficient to act on the proposal without communicating the acceptance of it to himself, performance of the conditions is sufficient acceptance without notification.

The decision of the instant case involves a situation in which silent inaction is coupled with an overt act of indorsement which tends to clarify the ambiguity of such silence. The proposition of law enunciated by the court is broad enough, however, to support a holding that silence could amount to an acceptance if silence was the mode of acceptance indicated by the offeror. Is this position tenable?

A contract is formed by the acceptance of an offer.<sup>2</sup> Acceptance of an offer to enter into a bilateral contract is not only an expression of assent to the proposition,<sup>3</sup> but is the giving of the return promise requested. The offeree must in fact make a promise to the offeror, and a promise, as the offeree should reasonably understand, is something which involves communication or attempted communication.<sup>4</sup>

An exceptional case arises where the offeror has expressed himself as satisfied with a mode of acceptance which does not necessarily involve even an attempt at communication. Ordinarily an offeree is not obliged to reject an offer at the risk of entering into a contract, and his silent inaction cannot be construed as an assent to the offer.<sup>5</sup>

<sup>2</sup>Ft. Worth, Etc., Ry. v. Lindsey, 11 Tex. Civ. App. 244, 32 S. W. 714 (1895).

<sup>3</sup>Stephenson v. Glass, 276 S. W. 110 (Tex. Civ. App., 1925); Wheeler v. Holloway, 276 S. W. 653 (Tex. Comm. App., 1925).

<sup>4</sup>WILLISTON ON CONTRACTS, Sec. 82.

<sup>5</sup>Felthouse v. Bindley, 11 C. B. (N. S.) 869 (1862); Bank of Buchanan County v. Continental Nat. Bank, 277 Fed. 385 (1921); More v. New York Bowery Fire Ins. Co., 130 N. Y. 537, 29 N. E. 757 (1892); Baltimore & L. Ry. Co. v. Steel Rail Supply Co., 123 Fed. 655, 59 C. C. A. 419 (1903). In Prescott v. Jones, 69 N. H. 305, 41 Atl. 352 (1898), the court stated: "A party cannot, by the wording of his offer, turn the absence of communication, of acceptance into an acceptance, and compel the recipient of his offer to refuse it at the peril of being held to have accepted it. A person is under



But it does not follow from this that the offeree may not choose to comply with the terms of the offer and bind the offeror. The relations between the parties, or the peculiar circumstances may have been such as to have warranted the offeror in expecting a reply, and therefore, in assuming that silence indicated assent to his proposal.<sup>6</sup> Such cases may be thus classified:

(1) Where the offeree with reasonable opportunity to reject offered services takes the benefit of them under circumstances which would reasonably indicate that they were not rendered gratuitously.

(2) Where the offeror has stated or given the offeree reason to understand that assent may be manifested by silence or inaction, and the offeree in remaining silent intends to accept the offer.

(3) Where, because of previous negotiations or otherwise, the offeree has given the offeror reason to understand that the silence or inaction was intended by the offeree as an expression of assent, and the offeror does so understand.

(4) Where the offeree takes or retains possession of property which has been offered to him.

The rule in regard to the first class of cases is well settled, that in the absence of family relationship,<sup>7</sup> where one renders beneficial services for another the law ordinarily infers a request for such services and a promise to pay the amount which the services are reasonably worth, unless they are rendered under circumstances which repel this inference, or unless it is understood that they are to be rendered gratuitously.<sup>8</sup> The question in each case is, do the particular facts of the case in consideration fairly warrant the inference of a promise to pay.<sup>9</sup>

It is the opinion of the writer that the most efficacious solution of the second class of cases has been advanced in a cogent line of argument by Professor Williston,<sup>10</sup> to the effect that even in cases where the offeror is not justified in understanding the offeree's silence as an acceptance, mere silence, though unaccompanied by any act, may

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no obligation to do or say anything concerning a proposition which he does not choose to accept. There must be actual acceptance or there is no contract." See also WILLISTON ON CONTRACTS, Sec. 91; ANSON ON CONTRACTS, 3d. Ed. p. 35; 13 Corpus Juris 276.

<sup>6</sup>Hobbs v. Massasoit Whip Co., 158 Mass. 194, 33 N. E. 495 (1893); Mfg. Bureau v. Everwear Hosiery Co., 152 Wis. 73, 138 N. W. 624 (1913) (inaccurate integration of oral contract received without objection); House v. Beak, 141 Ill. 290, 30 N. E. 1065 (1892).

<sup>7</sup>Nelson v. Nelson, 210 Ala. 592, 98 So. 885 (1924); Howard v. Randolph, 134 Ga., 691, 68 S. E. 586, 29 L. R. A. (N. S.) 294 (1910) (adopted member of family); Rosky v. Schmitz, 110 Wash. 547, 188 Pac. 493, 10 A. L. R. 133 (1920); 20 R. C. L. 593.

<sup>8</sup>Day v. Caton, 119 Mass. 513 (1876) (if silence may be interpreted as assent where a proposition is made to one which he is bound to deny or admit, so also may it be if he is silent in the face of facts which fairly call upon him to speak); O'Neal v. Knippa, 19 S. W. 1020 (Tex. Civ. App., 1892).

<sup>9</sup>Tyson & Arrington v. Thompson, 195 Ala. 230, 70 So. 649 (1915).

<sup>10</sup>WILLISTON ON CONTRACTS, Sec. 91.

amount to an acceptance if the offeror requested that mode of indicating assent, and assent was intended by the offeree. When an offer is made to one who remains silent, the silence may be due to a variety of causes. It is clear that whatever may have been the offeree's state of mind, no contract can be made unless the offer stated that the offeror would assume assent in case the offeree made no reply. But if the offer does so state, the offeree's silence is ambiguous, and it is to be remembered that in cases of ambiguity or dubious acts the actual intention of the parties must be inquired into in determining the legal effect of their conduct,<sup>11</sup> and may doubtless be shown not to have meant assent. If, however, it can be shown that his silence was intended as an acceptance of the offer, common reason and principle afford no tenable grounds for denying the existence of a contract.

It has been suggested that nonfeasance should not be sufficient to constitute assent.<sup>12</sup> But why should there be an objection to inaction in bilateral contracts, when it is universally recognized that an offer calling for inaction of any nature, which contemplates a unilateral contract may be accepted by a failure to communicate or by any other passive conduct which may be called for?<sup>13</sup> Whether the nonfeasance in such a contract is acceptance is always a question of fact. The question in each case is, did the party act upon the faith of and pursuant to the promise?<sup>14</sup> Thus abstaining from drinking or swearing, at the request of the promisor and in reliance upon his promise of reward is sufficient to bind the offeror to his promise.<sup>15</sup> To put a more extreme test case, A says to B, "I will give you ten dollars if you will remain silent for the next hour." B remains silent intending to accept the offer and thereby completes a binding agreement under the rules applicable to unilateral contracts.<sup>16</sup> Again, A makes the same offer but appends thereto: "If you are silent for the next three minutes I will regard it as an acceptance of this offer." B remains silent as before. In both cases the conduct is the same. The court and jury must find identically the same facts, in determining whether a recovery upon the contract should be allowed. Of course, in the bilateral contract there must be a promise or circumstances from which a promise may be inferred. But in both unilateral and bilateral contracts there must be an acceptance, that is, a manifestation of assent to the offer.<sup>17</sup> And it is submitted that if silence or nonfeasance will satisfy the requirement of acceptance in the one case it should have a like effect in the other. Certainly the offeror should not be heard to complain of the efficacy of silence as an

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<sup>11</sup>*Broadnax v. Ledbetter*, 100 Tex. 375, 99 S. W. 1111, 9 L. R. A. (N. S.) 1057 (1907); *Vitty v. Eley*, 51 N. Y. App. 44, 64 N. Y. Supp. 397 (1900).

<sup>12</sup>*Prescott v. Jones*, note 5, *supra*.

<sup>13</sup>*In re All Star Feature Corp.*, 232 Fed. 1004 (1916).

<sup>14</sup>*Edgerton v. Weaver*, 105 Ill. 43 (1882).

<sup>15</sup>*Hamer v. Sidway*, 124 N. Y. 538, 27 N. E. 256, 12 L. R. A. 463, 21 Am. St. Rep. 693 (1891).

<sup>16</sup>*Hamer v. Sidway*, note 15, *supra*.

<sup>17</sup>*WILLISTON, CONTRACTS*, Sec. 65.

acceptance when he has chosen this as preferable to any other mode of acceptance which he might have prescribed, and it has been proved that the offeree followed this method of acceptance intending to accept the offer. A conceivable objection that the offeree would swear that he did not intend to accept if the contract was of no benefit to him, is answered by the fact that such an objection is evidentiary and could be raised in any situation where the intention of the parties has to be inquired into. The objection to this position raised in *Prescott v. Jones*<sup>18</sup> is, that, "the law requires a consideration for those promises which it will enforce—to constitute acceptance there must be *words*, written or spoken, or some other *overt act*." Obviously such argument would be just as applicable to exclude nonfeasance as an acceptance of unilateral contracts, for there must be an acceptance in all simple contracts. The court overlooks the fact that the overt act theory of assent has an exception in cases of ambiguity, and that in such cases subjective intent must be resorted to for the purpose of determining the legal effect of the conduct of the parties.<sup>19</sup> It is apparent that the true reason for this position is that the courts lean strongly, even in cases of unilateral contracts, in construing an offer as calling for acceptance by a counter-promise.<sup>20</sup> It might be suggested that in a unilateral contract the offeror assumes the burden of all the negotiations, but it is clear that he does the same thing when he calls for nonfeasance as acceptance in the bilateral contract. It is necessary, of course, that the offeree remain silent with the intention of accepting. But if the fact that the offer expressly or impliedly requested silence as a mode of acceptance, concurred with the fact that the offeree remained silent with the intent to accept, every requirement of a contract seems present.<sup>21</sup> The court's decision in the principal case is in consonance with this proposition. We quote these apt statements from the opinion:

The existence of the contractual capacity imports the right of the offeror to dispense with notification. The court cannot properly restate the offer so as to make the offeror declare that a contract shall be made only when the approval shall have been promptly given at Chicago, and that fact shall have been communicated to the offeror.

A much more extreme case arises where the offer indicates that silence will be sufficient as an acceptance, and the offeree, fully aware of the fact that his silence will be misunderstood, remains silent. It is at least arguable that in such a case the offeree ought not to be permitted to escape the natural construction of his silence, and be-

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<sup>18</sup>Note 5, *supra*.

<sup>19</sup>*Marks v. Gowdin*, 226 N. Y. 138, 123 N. E. 159 (1919); WILLISTON ON CONTRACTS, Sec. 20.

<sup>20</sup>*Martin v. Meles*, 179 Mass. 114, 60 N. E. 397 (1901).

<sup>21</sup>*Cavanaugh v. Ranlett*, 229 Mass. 336, 113 N. E. 659 (1918); WILLISTON ON CONTRACTS, Sec. 91.

cause of his failure to speak should be held to have accepted the offer.<sup>22</sup>

The justice and soundness of holding the offeror to the agreement becomes more apparent when one looks to the other side of the shield and finds that the offeree is bound by his silence as having accepted the offer if he has expressly agreed in advance that silence shall be equivalent to assent,<sup>23</sup> or if his conduct is such as to give the offeror reason to understand that offeree's silence will be an acceptance, and the offeree does so understand.<sup>24</sup> Two recent Texas cases illustrate this point. In *Patterson v. Brown Shoe Co.*,<sup>25</sup> the retention of an order given to defendant's agent, for an unreasonable time, without repudiation, was held to have amounted to an acceptance of the order. The court declared:

A's conduct, of which his silence is a part, may be such as to lead B to believe that A has accepted B's offer.

In *Pierce Oil Corp. v. Gilmer*,<sup>26</sup> after holding that a failure to object to a modification of the original offer within a reasonable time amounted to an acceptance of it, the court asserted that silence does not often constitute assent, but when the circumstances naturally suggest that some objection should be made, if any exists, it is sufficient

<sup>22</sup>In *Cavanaugh v. Ranlett*, *supra*, pursuant to a telephonic communication the offeror sent a memorandum of sale to the buyer which after stating the terms of the bargain contained these words: "This is a contract and will be considered mutually binding unless we are advised of its non-acceptance by wire." The court held: It could not be ruled as a matter of law that if the confirmation were treated as an offer it became a binding agreement from the failure of the plaintiffs to reply. The jury under all of the circumstances were to say whether the plaintiff's silence amounted to an assent. The Swiss Code of Obligations (Art. 6) provides: "When the offeror ought not reasonably, whether from the particular nature of the transaction or from circumstances to expect an express acceptance, the contract is deemed concluded if the offer has not been refused within a reasonable time."

<sup>23</sup>*House v. Beak*, 141 Ill. 290; 30 N. E. 1065 (1892).

<sup>24</sup>*Hobbs v. Massasoit Whip Co.*, 158 Mass. 194, 33 N. E. 495 (1893), plaintiff had made previous shipments of goods of a certain type to defendant which defendant had always accepted. Defendant's conduct warranted the conclusion that there was a standing order for goods of this type. Mr. Justice Holmes, in the opinion stated: "A duty was imposed on the buyer to act in regard to the goods sent by the seller and that silence on the part of the buyer, coupled with the retention of the goods for an unreasonable time, might be found by the jury to warrant the plaintiff in assuming that they were accepted, and thus to amount to an acceptance. . . . Conduct which imports acceptance or assent, is acceptance in view of the law." See also 23 COLUMBIA LAW REVIEW 186; *Farmer's Produce Co. v. McAlester Storage and Commission Co.*, 48 Okla. 488, 150 Pac. 483 (1915); *Natl. Fire Ins. Co. v. Ehrlich* (N. Y.), 122 Misc. 682, 203 N. Y. Supp. 434 (1924).

<sup>25</sup>210 S. W. 737 (Tex. Civ. App., 1919), *Blue Grass Cordage Co. v. Luthy & Co.*, 98 Ky. 583, 33 S. W. 835 (1896); *accord*, *Cole-McIntyre Co. v. Holloway*, 141 Tenn. 679, 214 S. W. 817 (1919).

<sup>26</sup>230 S. W. 1116 (Tex. Civ. App., 1921).



to support a finding of assent by the offeree.<sup>27</sup> The offeree's silence under circumstances indicating acquiescence in a counter-offer,<sup>28</sup> late acceptance,<sup>29</sup> a policy of insurance containing a different agreement from that contemplated by a previous oral contract between the applicant and the company<sup>30</sup> and in some jurisdictions in an account stated,<sup>31</sup> has been held to constitute an acceptance. Likewise, a failure to refund an advance payment, made contemporaneously with the offer, at the time fixed for the acceptance of the offer or the return of the money, is sufficient acceptance of the offer.<sup>32</sup>

Evidence of the custom of the trade is permissible to aid in the determination of whether silence amounts to an acceptance.<sup>33</sup>

Where the offeror has sent property to the offeree with the understanding that if it is retained for a certain period the offeror will consider it sold, a duty is imposed upon the offeree to return the property or give notice of disapproval within a reasonable time, if no time is stipulated; and if he disregards this duty he will be held to have accepted the property.<sup>34</sup> In cases of sale on approval where a certain period is allowed in which the offeree may approve the goods, his retention without dissent after the end of the stipulated period is treated as an acceptance.<sup>35</sup> Although the offeror in sending the goods has not stated that they are to be paid for, but the circumstances repel any other assumption, then again the duty is on the offeree to return or notify of disapproval.<sup>36</sup> In either case if the inaction is accompanied by some indication of disapproval the silence will not be construed as constituting assent.<sup>37</sup>

A consideration of the principles involved in the cases above discussed discloses the soundness of the principal case and leads inevitably to the conclusion that silence may amount to an acceptance

<sup>27</sup>C. P. Ray & Co. v. La Rue and Barron Co., 237 S. W. 336 (Tex. Civ. App. 1922); see also Stewart v. Hemphill, 245 S. W. 123 (Tex. Civ. App., 1922); Lechler v. Montana Life Ins. Co., 186 N. W. 271, 23 A. L. R. 1193 (N. D., 1921).

<sup>28</sup>Bartlett v. Doyle, 161 Wis. 624, 155 N. W. 125 (1915).

<sup>29</sup>Phillips v. Moor, 71 Me. 78 (1880); *contra*, Ferrier v. Storer, 63 Ia. 484, 19 N. W. 288, 50 Am. Rep. 752 (1884).

<sup>30</sup>Johnson v. White, 120 Ga. 1010, 48 S. E. 426 (1904).

<sup>31</sup>Crane v. Stansbury, 173 Cal. 631, 16 Pac. 7 (1916).

<sup>32</sup>Enterprise Mfg. Co. v. Campbell, 121 S. W. 1040 (Ky., 1909).

<sup>33</sup>T. C. May v. Menzies Shoe Co., 184 N. C. 150, 113 S. E. 593 (1922).

<sup>34</sup>Preferred Acc. Ins. Co. v. Stone, 61 Kans. 48, 58 Pac. 986 (1899); Lamson Con. Store Service Co. v. Weil, 15 Daly 498, 8 N. Y. Supp. 336 (1890); Springfield Engine Stop Co. v. Sharp, 184 Mass. 266, 68 N. E. 224 (1903).

<sup>35</sup>Butler v. School District, 149 Pa. 355, 24 Atl. 308 (1892); Street v. J. I. Case Threshing Machine Co., 188 S. W. 725 (Tex. Civ. App., 1916); Wheeler v. Klaholt, 178 Mass. 141, 59 N. E. 756 (1901), carries this principle too far when it says the offeree is under a duty to return the goods.

<sup>36</sup>Garst v. Harris, 177 Mass. 72, 58 N. E. 174 (1900).

<sup>37</sup>In re Downing Paper Co., 147 Fed. 858 (1905); Ellis v. Mortimer, 1 Bos. and Pul. (N. R.) 259, 127 Eng. Rep. 461 (1805).

of an offer contemplating a bilateral contract. The decisions which militate against this position tend to abort the clearly expressed intention of the parties and controvert the fundamental rule of contract law, that the offeror may make his offer as broad or as narrow as he chooses.

*Joe Ewing Estes.*

WHEN A CONVEYANCE TO A MARRIED WOMAN IS CONSIDERED A GIFT FOR HER SEPARATE ESTATE.—Gifts of real property from the husband to the wife were prohibited in Texas under the Spanish law up to 1840.<sup>1</sup> The husband in order to perfect a gift to his wife did so by the intervention of a trustee. Under the common law of England, adopted in Texas by an act of Congress in 1840,<sup>2</sup> a deed from the husband to the wife was void, she having no capacity to receive the deed, being in contemplation of law but one with her husband.<sup>3</sup> Statutory enactments then followed which gave the husband the power to make a conveyance to his wife as a valid gift without the intervention of a trustee.<sup>4</sup> A limitation,<sup>5</sup> however, has been placed upon gifts inter vivos by Article 3998, REV. CIV. STAT. 1925, which prescribes two requisites before a gift is completed. First: The intent to make a present gift to persons in being. Second: The doing by the donor of all that is essential to transfer his right to the donee. The intention at the time the deed is taken must be proved, by showing what the husband's declarations and conduct were, and by the recitals in the deed.<sup>6</sup>

The constitution provides that all property acquired after marriage is community, except that which is acquired by gift, devise or descent.<sup>7</sup> Article 4619<sup>8</sup> raises a statutory presumption that all property acquired by either the husband or the wife is community property. This presumption may be rebutted, the burden of overcoming the presumption being on the party asserting separate ownership in either spouse.<sup>9</sup>

Our courts in determining whether the status of property is community or separate, have uniformly given a liberal construction to

<sup>1</sup>*Brown v. Wheelock*, 13 Tex. 385 (1889); *Scott and Solomon v. Maynard*, Dallam 550.

<sup>2</sup>Article 127; Act of Jan. 20, 1840, Vol. 4, p. 3 HARTLEY'S DIGEST OF THE LAWS OF TEXAS, p. 120.

<sup>3</sup>*Fitts v. Fitts*, 14 Tex. 443 (1885).

<sup>4</sup>*Story v. Marshall*, 24 Tex. 305, 76 Am. Dec. 106 (1859); *Fitts v. Fitts*, *supra*.

<sup>5</sup>*McFerrin v. Templeman*, 102 Tex. 530, 120 S. W. 167 (1909); *First Natl. Bank of Plainview v. McWhorter*, 179 S. W. 1147 (Tex. Civ. App., 1915).

<sup>6</sup>*Cummins v. Cummins*, 224 S. W. 903 (Tex. Civ. App., 1920); *Sabinal Natl. Bank v. Cunningham*, 256 S. W. 317 (Tex. Civ. App., 1923).

<sup>7</sup>Sec. 15, Art. 16, TEXAS CONSTITUTION.

<sup>8</sup>REV. CIV. STAT. 1925.

<sup>9</sup>*Caffey's Ex'rs v. Cooksey*, 19 Tex. Civ. App. 145, 47 S. W. 65 (1898).

the articles defining community property,<sup>10</sup> and a strict construction to the article defining separate property.<sup>11</sup> The rights of a married woman have been steadily increasing, and under the present law she has the right to control her separate property;<sup>12</sup> her separate property is not subject to her husband's debts;<sup>13</sup> and by the recent decision of *Arnold v. Leonard*<sup>14</sup> the income from her separate property is not subject to her husband's debts. These rights of the married woman make it very essential to determine what is her separate property from the time the property is acquired, whereas formerly the question arose only upon divorce or death of either spouse.

For convenience in this discussion, conveyances to a married woman as a gift will be treated in three classifications. First: A conveyance by a third party to a married woman as a gift from her husband of his community interest. Second: A conveyance by the husband to the wife as a gift. Third: A conveyance by a third party as a gift to both husband and wife. In dealing with the presumptions that arise from these conveyances, it is obvious that the answer to the question, who has the burden of rebutting the presumption will frequently control the decision of the case. "A presumption of law," says Judge Speer, "is indulged upon the theory that it is most probably in keeping with the truth of the facts upon which it is based. A thing is presumed to be true, where presumptions are indulged at all, because it most likely is true according to the ordinary experience and observation of men."<sup>15</sup>

In the first classification where the land is conveyed to the wife by a third party, in the absence of any recitations in the deed showing the consideration to have been paid out of the wife's separate estate, or that the conveyance is made for "her separate use and benefit," the statutory presumption that the conveyance is community property prevails.<sup>16</sup> It then devolves upon the party who asserts the contrary

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<sup>10</sup>Art. 4619, REV. CIV. STAT. 1925; *Lee v. Lee*, 247 S. W. 828 (Tex. Comm. App., 1923). Judge German quoting from SPEER'S LAW OF MARITAL RIGHTS IN TEXAS, p. 392: "The general trend of our decisions is to hold the community the all-important estate during marriage, and to regard the separate estate as creatures wholly of the statutes; and where there is doubt or difficulty in applying the strict letter of that statute to a particular fund or property, the usual course is to declare it community by force of the presumptions previously noticed."

<sup>11</sup>Art. 4614, REV. CIV. STAT. 1925.

<sup>12</sup>Art. 4614, REV. CIV. STAT. 1925.

<sup>13</sup>Art. 4616, REV. CIV. STAT. 1925.

<sup>14</sup>114 Tex. 535, 273 S. W. 799 (1925), discussed in 4 TEXAS LAW REVIEW 154. This is based on Art. 4616, REV. CIV. STAT. 1925.

<sup>15</sup>SPEER'S LAW OF MARITAL RIGHTS IN TEXAS, p. 384.

<sup>16</sup>*Chaffrey's Ex'rs v. Cooksey*, 19 Tex. Civ. App. 145, 47 S. W. 65 (1898); *Hirsch v. Howell*, 60 S. W. 887 (Tex. Civ. App., 1900); *Sabinal Natl. Bank v. Cunningham*, 256 S. W. 317 (Tex. Civ. App., 1923); *Stopplesberg v. Stopplesberg*, 222 S. W. 587 (Tex. Civ. App., 1920), in which the court held that where land conveyed to the wife, part of the consideration being paid with community funds and part with the wife's separate funds, did not destroy the

to prove it. But where the deed limits the conveyance to her separate estate by the use of the words "her sole and separate use" or by words of the same import, then the property is prima facie the separate property of the wife; and the burden is on the party asserting the opposite.<sup>17</sup> These presumptions are applicable to a case arising between the husband and the wife, or their heirs, legatees, or representatives.

A very recent case coming within this category is that of *Kearse v. Kearse*.<sup>18</sup> The deed in that case recited the grant as being "to Rosetta Kearse as her separate property"; and the habendum as being "to the said Mrs. Kearse as her separate property, her heirs and assigns forever." The legal effect of such a grant is to raise a pre-

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sumption that the property was community, and that the evidence was not clear and satisfactory to prove a gift.

*Higgins v. Johnson*, 20 Tex. 389, 70 Am. Dec. 394 (1857); *Swink v. League*, 6 Tex. Civ. App. 309, 25 S. W. 807 (1894); *Wade v. Wade*, 106 S. W. 188 (Tex. Civ. App., 1907); *Cummins v. Cummins*, 224 S. W. 903 (Tex. Civ. App., 1920); *Carmichael v. Williams*, 268 S. W. 502 (Tex. Civ. App., 1925); *Dallas Plumbing Co. v. Harrington*, 275 S. W. 190 (Tex. Civ. App., 1925); *Watkins v. Watkins*, 119 S. W. 145 (Tex. Civ. App., 1909). Where the husband conveys community property to a third person with an agreement to reconvey to the wife; held, not sufficient to rebut the presumption that it is community property. *Parker v. Chance*, 11 Tex. 513 (1854); *Du Perier v. Du Perier*, 59 Tex. Civ. App. 224, 126 S. W. 10 (1910). Compare with *Ferguson v. Dodd*, 183 S. W. 391 (Tex. Civ. App., 1916), where the court held that a conveyance from the husband to a third party and then by him to the wife, was equivalent to a deed by the husband to the wife and raised a presumption that this was her separate property as a gift from the husband to the wife.

<sup>17</sup>*McCutchen v. Purinton*, 84 Tex. 603, 19 S. W. 710 (1892); *Zorn v. Tarver*, 57 Tex. 388 (1882); *Goldberg v. Zellner*, 235 S. W. 870 (Tex. Comm. App., 1921); *Kearse v. Kearse*, 276 S. W. 690 (Tex. Comm. App., 1926); *Markum v. Markum*, 273 S. W. 296 (Tex. Civ. App., 1925).

<sup>18</sup>276 S. W. 690 (Tex. Comm. App., 1926). The facts in that case were these: Calhoun and Rosetta Kearse were married in 1869. There was a continued living apart after September, 1898. In January, 1893, Calhoun purchased 144 acres of land, the consideration being \$200 paid in cash and \$2,059.80 "to be paid" evidenced by a series of notes payable yearly. None of the deferred payments were made, and in June, 1898, Mrs. Bibbee, a daughter, purchased the notes at the request of Calhoun. In September, 1898, shortly after the separation, Mr. and Mrs. Kearse executed to Mrs. Bibbee a warranty deed conveying the 144 acres, in consideration of the cancellation of the notes. At the request of Mrs. Kearse "to sell the land back to her" there was a conveyance by warranty deed January 11, 1899, from Mrs. Bibbee to Mrs. Kearse. The recited consideration was \$3,100, which "was to be paid" and which was evidenced by a series of 10 notes. The recited consideration was never paid. Mr. Kearse had no connection whatever with these transactions. On January 5, 1901, Mr. Kearse joined with his wife in a conveyance of 80 acres of the tract to Mrs. Bibbee for a consideration of \$1,600 cash. Mr. Kearse died in September, 1909, and Mrs. Kearse in a suit against the heirs is claiming the remaining tract not conveyed, as her separate property by virtue of the words as used in the deed of January 11, 1899; and as a gift from her daughter, Mrs. Bibbee.



sumption that the conveyance was for her separate property.<sup>19</sup> Evidence having been introduced to show that she did not pay for the land out of her separate funds, the land conveyed was held to be community estate. As for Mrs. Kearsse's contention that this was her separate property as a gift from her daughter, it was shown that such could not have been the intention of the parties; since Mrs. Kearsse requested Mrs. Bibbee "to sell the land back to her" and the deed recited a consideration of \$3,100, when Mrs. Bibbee's investment was only \$1,957. These were circumstances which clearly indicated that the intention was not to make a gift. Furthermore, if the intention of Mrs. Bibbee was to make a gift of the land to Mrs. Kearsse, why did she retain a lien on the land? It is also noteworthy that the court stressed the fact that Mr. Kearsse had no notice of the deed. This is important, because if he had notice, the court could have construed this fact as evidencing an intention to make a gift of his share of the community property to his wife.<sup>20</sup>

A case very similar to the one above where the court came to the opposite conclusion, is that of *Zorn v. Tarver*.<sup>21</sup> The court found from the evidence that Miss Young intended to make a gift to Mrs. Tarver of the difference between the amount that she paid for the land and the real value of the land, saying:

Miss Young had two objects in view in purchasing the land. First, to make a secure investment of her money and, second, to benefit her cousin, Mrs. Tarver. If Miss Young had herself sold the land and conveyed the remainder to her cousin, she would have accomplished directly what the proof shows was indirectly done.

The intention of the grantors in the two cases may be distinguished by the fact, that in the *Kearsse Case* Mrs. Bibbee conveyed the land for its full market value, and retained a lien for the non-payment of the consideration, in contrast to the *Zorn Case* where the conveyance was made for an amount considerably less than the market value of the land.

Where the wife is claiming the conveyance as a gift from her husband against the right of a creditor, the question of fraudulent conveyances enters into the controversy, and the rule of policy that the husband must be just before he is generous applies.<sup>22</sup> However,

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<sup>19</sup>*McCutchen v. Purinton*, 84 Tex. 603, 19 S. W. 710 (1892); *Goldberg v. Zellner*, 235 S. W. 870 (Tex. Comm. App., 1921).

<sup>20</sup>*Emery v. Barfield*, 156 S. W. 311 (Tex. Civ. App., 1913); 183 S. W. 386 (Tex. Civ. App., 1916).

<sup>21</sup>57 Tex. 388 (1882). The facts in that case were: Miss Young purchased a tract of land at an execution sale and conveyed it to Mrs. Tarver, her cousin, for a consideration of the amount paid at the execution sale and part for love and affection. The amount of the consideration was considerably less than the market value of the land, and was paid to Miss Young with the proceeds from a sale of part of the land. In a contest between Mrs. Tarver and her husband's creditors, the court held that the property was her separate property as a gift from Miss Young.

<sup>22</sup>*Donnebaum v. Tinsley*, 54 Tex. 362 (1881).

even as against a creditor the courts are guided by well established presumptions. If the conveyance is from a third party and the granting clause is in the name of the wife, without limiting the grant to her separate estate, the presumption is that the property is for the community estate and subject to its debts.<sup>23</sup> If the deed does limit the conveyance to the wife for her separate estate, then the presumption of a gift prevails, subject to rebuttal by parol evidence and to the rules governing fraudulent conveyances.<sup>24</sup> Where property, in the wife's name but not limited to her separate estate, is conveyed by the husband to an innocent purchaser for value without notice, any claim of the wife based on the actual separate character of the property is regarded as a prior equity which is cut off by the bona fide purchase of the legal title.<sup>25</sup> If the deed does limit the conveyance to the wife's separate estate, then the purchaser takes subject to the wife's interest in the property.<sup>26</sup>

The majority of the Courts of Civil Appeals are in accord in the application of presumptions concerning community property. However, there is some dissension regarding the presumption that a conveyance is presumed community property where the deed from a third party is in the wife's name but does not have a clause limiting it to her separate estate. Though it seems more logical to consider such a conveyance as presumptively made for her separate estate; still such a presumption can not prevail in the light of Article 4619.<sup>27</sup> This statute raises a presumption that all property acquired by either the husband or the wife is community property and is unambiguous and subject to but that one construction. However, there are a few decisions that support the contrary erroneous presumption.<sup>28</sup> Judge

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<sup>23</sup>*Morrison & Hart, Ex'rs, v. Clark*, 55 Tex. 437 (1881). "A gift from husband to wife is not necessarily fraudulent and void as to existing creditors. It might be a badge of fraud, a circumstance to be considered, in determining whether the intent was fraudulent, if it were shown that he was heavily indebted at the time." *Dunham v. Chatham*, 21 Tex. 231, 73 Am. Dec. 228 (1858); *Cook v. Bremond*, 27 Tex. 457, 86 Am. Dec. 626 (1864); *New England Loan and Trust Co. v. Avery*, 41 S. W. 673 (Tex. Civ. App., 1897); *McKamey v. Thorpe*, 61 Tex. 648 (1884); *Parks v. Worthington*, 101 Tex. 505, 109 S. W. 909 (1908); *Amend v. Jahns*, 184 S. W. 729 (Tex. Civ. App., 1916).

<sup>24</sup>*Gamble v. Dabney*, 20 Tex. 69 (1857).

<sup>25</sup>*Crawford v. Gibson*, 203 S. W. 375 (Tex. Civ. App., 1918); *Houston Oil Co. of Texas v. Choate*, 232 S. W. 285 (Tex. Comm. App., 1921).

<sup>26</sup>*Stoker v. Bailey and Goodjohn*, 62 Tex. 299 (1884); *White v. McGregor* 92 Tex. 556, 50 S. W. 564 (1899); *Laufer v. Powell*, 30 Tex. Civ. App. 604, 71 S. W. 549 (1902).

<sup>27</sup>REV. CIV. STAT. 1925: "All property acquired by either the husband or the wife during marriage, except that which is the separate property of either, shall be deemed the common property of the husband and wife. . . ."

<sup>28</sup>The latest case in which this presumption was indulged in, is *Richards v. Hartley*, 194 S. W. 478 (Tex. Civ. App., 1917). In *Daggett v. Worsham*, 264 S. W. 180 (Tex. Civ. App., 1924), Judge Conner after stating that the deed from a third party in the name of the wife prima facie places it in the

Speer also shows a reluctance to support the statutory presumption in this situation,<sup>29</sup> though he recognizes that it is idle to argue the correctness of such doctrine.<sup>30</sup>

The presumptions that arise from conveyances by the husband to his wife are more simplified than in the first classification. This is due to the fact that the only presumption that could have any effect is that the conveyance was intended for her separate estate. To presume otherwise construes the deed as passing title from the community to the community; or that it passed nothing. Therefore, in a conveyance from the husband to his wife the presumption arises that it is her separate property by virtue of a gift.<sup>31</sup> If

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community estate, said: That since the husband caused the conveyance to be taken in his wife's name that fact raised a presumption that he intended the property to be her separate property. He then considers evidence aliunde the deed which showed that the conveyance was intended for her separate property, thereby making it unnecessary to decide the case on the words in the deed alone. In *Emery v. Barfield*, 156 S. W. 311 (Tex. Civ. App., 1913), 183 S. W. 386 (Tex. Civ. App., 1916), it was said, that taking the deed in the wife's name may be a circumstance tending to show that the husband intended to make a gift of the property to his wife. The case of *Smith v. Bouquet*, 25 Tex. 507 (1864), goes much further. Judge Moore says: "And if he purchase with his separate property or community funds, and takes title in the name of the wife, the presumption, as between themselves and all others not claiming as innocent purchasers, will be that the property was intended for her and not for himself or the community." Citing *Higgins v. Johnson*, 20 Tex. 389, 70 Am. Dec. 394 (1857), in which Judge Hemphill holds just the contrary. "And as a general rule, deducible from our former laws, property purchased during marriage, whether the conveyance be in the name of the husband or the wife, or in the names of both, is prima facie presumed to belong to the community."

<sup>29</sup>*SEER'S MARITAL RIGHTS IN TEXAS*, pp. 384-385: ". . . The wife can not control the community, nor convey it. She is not the lawfully recognized manager of the estate, hence a conveyance to her for the community is out of the ordinary way of transaction with that estate and ought not to be presumed for the community. Besides it comports with the experience and observation of all men that conveyances are made to the wife only in those cases where the parties intended that she shall have some separate interest. Why should the law indulge a presumption not in keeping with the facts as they most probably are, but opposed to them?"

<sup>30</sup>*Ibid.*, p. 385. ". . . But it is probably idle to argue the correctness of such doctrine, since few questions are better supported by frequent decisions than is this."

<sup>31</sup>*Johnson v. Johnson*, 207 S. W. 202 (Tex. Civ. App., 1918); *Callahan v. Houston*, 78 Tex. 494, 14 S. W. 1027 (1890); *Story v. Marshall*, 24 Tex. 305, 76 Am. Dec. 106 (1859); *Watts v. Bruce*, 31 Tex. Civ. App. 347, 72 S. W. 258 (1903). In *Lewis v. Simon*, 72 Tex. 470, 10 S. W. 544 (1889), the deed recited a consideration of \$10 and for love and affection. It was held that the consideration of \$10 was merely nominal and that the land became her separate property. Consideration held nominal in the following cases: *Brantley v. Brantley*, 145 S. W. 1024 (Tex. Civ. App., 1912); *Stafford v. Stafford*, 41 Tex. 111 (1874); *Robertson v. Hefley*, 55 Tex. Civ. App. 368, 118 S. W. 1159 (1909); *Fitts v. Fitts*, 14 Tex. 443 (1855).

the deed recites that it is the intention of the husband that it should be the separate estate of the wife, the presumption is greatly strengthened. If the deed further recites that the consideration was paid by the wife with her separate funds, the conveyance is considered her separate property as a result of the words used, and the parol evidence rule prevents the showing of a contrary intent in a suit between the spouses or those claiming under them.<sup>32</sup> Another presumption in favor of the wife's separate property, is where the husband takes a deed from the third party in the name of the wife and pays the consideration out of his separate estate.<sup>33</sup> The foundation of this presumption is that the purchase is intended as a provision for her. However, the law does not allow the husband to make a gift to his wife which would injure the rights of existing creditors.<sup>34</sup>

The third classification presents a situation in which the conveyance is from a third party as a gift to both the husband and wife. The early Texas law, which was based upon the Spanish laws, considered a conveyance by way of gift to both husband and wife, as their community property.<sup>35</sup> This is not the law today; as, if the intention is to govern and if the gift is to be in fact to the husband and wife jointly, they would then each own an undivided interest, a separate estate therein.<sup>36</sup> The present holding seems the more reasonable, as there is no logic in saying that because the husband enjoyed an estate in a particular piece of property, any estate which the wife likewise enjoyed by gift in the same property would in consequence be community. Titles acquired from the state are subject to the same rules as those governing individuals.<sup>37</sup>

The presumptions that were noted in the above classifications were as a general rule not conclusive, and merely placed the duty of going forward with the evidence on the party against whom the presumption

<sup>32</sup>Kahn v. Kahn, 94 Tex. 114, 58 S. W. 825 (1900). Discussed more fully, *post*.

<sup>33</sup>Tison v. Glass, 46 Tex. Civ. App. 163, 102 S. W. 751 (1907). . . . "The deed was made to her whether in her own separate right or not does not appear, but independent of this, the mere fact that James W. Tison bought the land with his separate means and had the deed made to his wife as between the parties, was sufficient to show that he intended it as a gift to her." Armstrong v. Turbeville, 216 S. W. 1101 (Tex. Civ. App., 1919); Dean v. Dean, 214 S. W. 505 (Tex. Civ. App., 1919); Tucker v. Carr, 39 Tex. 98 (1873); Smith v. Sfrahan, 25 Tex. 103 (1860); Hardin v. Jones, 29 Tex. Civ. App. 350, 68 S. W. 836 (1902); Dunham v. Chatham, 21 Tex. 231, 73 Am. Dec. 228 (1858).

<sup>34</sup>Notes 23 and 24, *supra*.

<sup>35</sup>Yates v. Houston, 3 Tex. 433 (1848).

<sup>36</sup>Rogan v. Williams and Co., 63 Tex. 123 (1885); Bradley v. Love, 60 Tex. 472 (1883).

<sup>37</sup>Creamer v. Briscoe, 101 Tex. 490, 109 S. W. 911, 130 Am. St. Rep. 869, 17 L. R. A. (N. S.) 154 (1908); Caddell v. Lufkin Land and Lumber Co., 255 S. W. 397 (Tex. Comm. App., 1923); Stiles v. Hawkins, 207 S. W. 89 (Tex. Comm. App., 1918).



was raised.<sup>38</sup> Therefore, the presumptions are most valuable in cases where there is no evidence of the intention of the grantor; for upon the introduction of evidence of the intention of the grantor contrary to the presumption, the effect of the presumption vanishes. Thus in a case where property is conveyed to the wife by a third party, without limiting it to her separate estate, parol evidence is admissible to rebut the statutory presumption; and to prove that it was the intention of the husband in taking the deed in the name of the wife to make the property her separate estate; or if the evidence shows that the consideration was paid out of his separate estate, that he intended to make a gift of the property to her; or if the evidence shows that the consideration was paid out of the wife's separate estate, the property remains her separate estate.<sup>39</sup> Where the conveyance by a third party is limited to the wife's separate estate, the property is *prima facie* her separate property; but it may be shown, that it was not the intention of the husband to make a gift of the property to his wife, though the deed was taken in her name, and despite the granting clause limiting it to her estate.<sup>40</sup>

Suppose the granting clause in the deed limits the conveyance to the wife's separate estate, and recites further that the consideration *was paid by her out of her separate funds*. Would this recitation be rebuttable? In the case of *Kahn v. Kahn*<sup>41</sup> the husband deeded land to his wife, the granting clause reciting a consideration of \$500, "paid by Amelia Kahn out of her separate funds and for her separate use and benefit." The divorced wife brought suit for the land as her separate property, and the husband attempted to introduce parol evidence to show that it was not their intention that the wife should hold the property as her separate estate, and that the consideration was paid for with community funds. The court, speaking through Mr. Justice Williams, in refusing to admit the parol testimony, said:

We are of the opinion that without proof of fraud or mistake in the insertion of the recitals in the deed, parol evidence was not admissible to show that the maker of it did not intend to convey the property to his wife as her separate property, and for this reason that the deed on its face clearly expressed such intent. . . . The evidence admitted does not come within the rule which sometimes permits the true consideration of an instrument to be shown to have been different from that recited. This principle, properly applied, admits the evidence where the consideration has been stated as a fact, but not where the recital is contractual in its nature.

From this it is evident that the recitation in a deed from the husband to his wife, that the consideration "was paid out of her separate estate," will not permit parol evidence, in a suit between the spouses,

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<sup>38</sup>*Markum v. Markum*, 273 S. W. 296 (Tex. Civ. App., 1925).

<sup>39</sup>Note 16, *supra*.

<sup>40</sup>Note 17, *supra*.

<sup>41</sup>94 Tex. 114, 58 S. W. 825 (1900).

to show that the grantor did not intend to convey to her as her separate property.

In the case of *McCulchen v. Purinton*<sup>42</sup> the granting clause in the deed from a third party to the wife was similar to the one in *Kahn v. Kahn*. The suit was between the heirs of the wife and one claiming under an execution deed to the land, which was levied upon as that of the husband. The court held that the recital removed the statutory presumption that the property bought during coverture was community, still where the rights of third parties are involved, parol evidence would be admissible to show such recitals were untrue, and that payments were in fact made with community funds.

A third possible situation is where the suit is between the husband and the wife, concerning property conveyed to the wife by a third party; the deed limiting the conveyance to her separate estate and reciting that the consideration, "was paid by her out of her separate funds." The question then arises whether the husband could introduce parol evidence to show that the wife did not pay for the property with her separate funds. We have seen that where the grant is from the husband to the wife, by a deed with words of the same import, and the suit is between the spouses, that parol evidence is not admissible. Also, where a similar deed to the wife from a third party is attacked by one not a party to the deed, parol evidence is admitted. Here, however, the situation is a combination of the two; the deed is to the wife from a third party and the suit is between the spouses. Though the court did not discuss the point, in a case where it had the same facts before it, they allowed the husband to introduce parol testimony to show that the community funds furnished the consideration.<sup>43</sup> The courts, therefore, do not make any distinction between the husband and a third person, if they were not parties to the deed, and allows parol evidence to be introduced. Consequently, the recitation that the consideration "was paid by the wife out of her separate funds" is irrebuttable only in a fact situation identical to the one in *Kahn v. Kahn*.<sup>44</sup>

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<sup>42</sup>84 Tex. 603, 19 S. W. 710 (1892).

<sup>43</sup>*Gebhart v. Gebhart*, 61 S. W. 964 (Tex. Civ. App., 1901). The court allowed parol evidence to show that the consideration was paid for with community funds, but that they were given to the wife in payment of a debt due from the husband contracted before their marriage, and therefore her separate property.

<sup>44</sup>For a discussion concerning recitations of consideration in deeds, see 4 TEXAS LAW REVIEW 266. In the case of *Maxson v. Jennings*, 19 Tex. Civ. App. 700, 48 S. W. 781 (1898), the deed was to the wife in consideration of a sum "paid by her." The court held that this was not even sufficient to take the conveyance out of the statutory presumption, saying: "The deed to her recited that the money was received from her, but not that it was her separate property; and being in her possession during marriage, it was presumptively community funds." Therefore, it would seem that the magic words concerning the admittance of parol evidence in a suit between the spouses, where the grant was from the husband to the wife, are: "to her sole and separate use" (or words of the same import) and that the consideration was paid by her out of her separate funds.

This examination of the decisions shows that their determination rests largely upon the presumption applicable under the facts of the particular case. It is also noticeable that although our statutes concerning community property as a whole have been frequently changed, the substance of the statute concerning conveyances to the wife has remained in effect unchanged.

Daniel Schlanger.

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IS THE HUSBAND IN TEXAS TAXABLE FOR THE ENTIRE COMMUNITY INCOME?—The decision of the United States Supreme Court in *United States v. Robbins et al.*<sup>1</sup> holding that under the Revenue Act of 1918, California community is taxable to the husband alone, is one of vital interest to the taxpayers of Texas and the six other states<sup>2</sup> having community property laws. The present regulations of the Treasury Department allow the husband and wife domiciled in Texas, and the other states referred to, each to report one-half of the community income for Federal income tax purposes. A different ruling by the Department for California was based upon the fact that in that state the wife had a mere expectancy and not a vested interest in the community property. In the *Robbins Case*, however, the Supreme Court did not base its decision solely on this rule of California law, but stated that "even if we are wrong as to the law of California and assume that the wife had an interest in the community income that Congress could tax if so minded, it does not follow that Congress could not tax the husband for the whole." Hence the question immediately arises as to whether this case will call for a change in the method of filing returns in the other community property states, or more particularly for the purposes of this comment, in Texas.

The problem readily resolves itself into two questions: First, does Congress have the power to tax a husband domiciled in Texas for the whole of the community income? Second, has Congress so taxed or so intended to tax the husband? A decision that Congress does not have the power to pass such a tax law would of necessity, it seems, be based on one or more of the following grounds: (1) That it would violate the constitutional rule of uniformity; (2) that it would undertake to tax one person upon the income of another; or (3) that it would undertake to deprive the several states of the right to determine the conditions under which income earned in such states shall vest in their citizens.

In view of the language of Justice Holmes in the latter part of the *Robbins Case* which seems clearly indicative of an intention on the part of the court to hold contrary to these contentions when the occasion arises, it hardly seems necessary to consider them. But the views may be advanced that this part of the decision is dictum, that

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<sup>1</sup>70 L. Ed. 183, 46 Sup. Ct. 148 (1926).

<sup>2</sup>Arizona, Idaho, Louisiana, Nevada, New Mexico, and Washington are the six other states having community property laws.

it applies only to the particular case involving California law, and that the reasons assigned for the conclusion reached are clearly not applicable in Texas. Consequently brief attention will be given to the several constitutional questions presented. "

The case of *Brushaber v. Union Pacific Railroad Co.*<sup>3</sup> is conclusive of the proposition that under the Sixteenth Amendment, income taxes, like other taxes such as excise, come within the constitutional requirement<sup>4</sup> that they "shall be uniform throughout the United States." It may be urged that to tax a husband in one of the community property states on *his* income and also on the interest in the community income conferred, under the *state constitution*, upon his wife, while at the same time a husband in any of the other states is taxed only on such of the marital income as becomes his property as it accrues under the law of such state, is discriminatory and in violation of the constitutional requirement of uniformity. That the Supreme Court will disregard this argument seems reasonably certain from the *Robbins Case*. Would this in reality constitute a lack of uniformity? For comparison let us consider the typical family in each class of states. In Texas, a husband earns the family income,—wages, salary, or business profits. He has complete control of its disposition; he may spend it practically as he chooses, except in a most extreme case of debauchery or fraud.<sup>5</sup> For all business purposes he is the owner. Consider the same family living in New York. The husband, we assume, would earn the income. He, too, has control of its disposition. Does the mere fact that the state laws of Texas name the interest of the wife in the income a vested one and call her the owner of one-half of the community property furnish sufficient reason for a rule of law that the husband in Texas should pay an income tax with the surtax graduated on the basis of two separate returns while a husband in New York pays a graduated surtax on the basis of a single return, when for all practical purposes the wife in New York has just about as many of the elements of ownership as does the one in Texas? Except in extreme cases the wife in neither state can exercise any control over the property while the husband lives. So might there not be a better basis for the Supreme Court to decide that the present method of filing returns violates the constitutional requirement of uniformity than for it to decide that requiring single returns in Texas would make for a lack of uniformity?

The next two contentions mentioned above may be considered together. That it would be unconstitutional to tax as income of a person that which is not his income was clearly pointed out in the case of *Eisner v. Macomber*,<sup>6</sup> where it was attempted to tax an individual on income that was in reality the income of a corporation in

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<sup>3</sup>240 U. S. 1, 60 L. Ed. 493, 36 Sup. Ct. 236 (1915).

<sup>4</sup>Art. 1, Sec. 8, of the Federal constitution.

<sup>5</sup>For a clear and comprehensive discussion of Texas community property laws, see 4 TEXAS LAW REVIEW 154.

<sup>6</sup>252 U. S. 189, 64 L. Ed. 521, 40 Sup. Ct. 189 (1920).



which he held stock. It seems too obvious to require argument that Congress cannot tax one individual for what is clearly the income of another. But the questions arise, first, what constitutes the income of an individual, for the purposes of the Federal income tax, and secondly, who shall determine what constitutes this income? If the second question be answered to the effect that the several states alone have the right to say what is the income of an individual, then the first question is also answered thereby. In the case of *De Vaughn v. Hutchinson*<sup>7</sup> the Supreme Court held in a suit between individuals that: "It is a principle firmly established that to the law of the state in which land is situated, we must look for the rules which govern its descent, alienation, and transfer." This is a typical case standing for the rule that the state alone has the power to determine the vesting of property rights within its boundaries. In the case of *Blum v. Wardell*<sup>8</sup> involving the Federal inheritance tax, decided by a Federal District Court of California, affirmed by the Ninth Circuit Court of Appeals,<sup>9</sup> it was held that the Federal courts in applying the Federal inheritance tax were bound by the decisions of the state courts of California construing the statutes of the state and holding that the wife upon the death of the husband takes title to half of the community property by virtue of her own interest therein and not as an heir. An earlier case of *Moffitt v. Kelley*<sup>10</sup> is frequently quoted to show that the Federal courts are bound in such matters to follow the state courts, the court there saying that the nature and character of the right of the wife in the community for the purposes of taxation is peculiarly a local question which the Supreme Court has no power to review. In that case, however, the court was asked to pass on the question whether the property taxed came within the provisions of a certain statute of the state levying a tax which the state was authorized to levy, and hence this decision has no real bearing on the question before us.

These cases are typical ones standing for the proposition that it must be left to the several states to determine the laws whereby contract and property rights are acquired in such states. The *Blum Case* furnishes the closest analogy to the problem before us and the strongest argument that the laws of the several states should be determinative of the question as to the individual against whom an income may be taxed. The other cases referred to were either cases involving contested rights between individuals or the application of state laws and are not in point here. But it may be argued with some force from the *Blum Case* that if the state law must determine the ownership of property for the purposes of an inheritance tax, the state law should likewise determine the ownership of an income for the purpose of an income tax.

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<sup>7</sup>165 U. S. 566, 41 L. Ed. 827, 17 Sup. Ct. 461 (1896).

<sup>8</sup>270 Fed. 309 (1920).

<sup>9</sup>276 Fed. 226 (1921). Writ of certiorari denied by the Supreme Court, 258 U. S. 617, 66 L. Ed. 793, 42 Sup. Ct. 271.

<sup>10</sup>218 U. S. 400, 54 L. Ed. 1086, 31 Sup. Ct. 79 (1910).

The strongest answer to this argument, however, is to be found in the recent case of *Burk-Waggoner Oil Ass'n v. Hopkins*,<sup>11</sup> and in the *Robbins Case*. In the *Burk-Waggoner Case* the issue involved was the power of Congress to levy an income tax against a concern as a corporation which under the laws of Texas was a partnership, and the income of which vested in the individual member. The following language of the court is significant:

It is true that Congress cannot make a thing income which is not so in fact. But the thing to which the tax was applied is confessedly income earned in the name of the association. It is true that Congress cannot convert into a corporation, an organization which by the laws of its state is deemed to be a partnership, but nothing in the constitution precludes Congress from taxing as a corporation an organization which although unincorporated, transacts business as if it were incorporated.

In other words the Supreme Court or Congress does not deny the state the power to determine whether an association is a corporation under the state laws, nor to determine who has the beneficial ownership of the income. But when in reality the income accrues to and is earned by the association as such, regardless of whether it is a legal entity or whether it has legal title to property, then Congress can tax the association for this income. Even conceding that ownership of the income must control in determining the incidence of the tax, surely there is greater reason to suppose that Congress can say that for the purposes of the Federal tax, the husband is the owner of the income which he has earned and over which he has control, than to have supposed it could impose the tax as levied and upheld in the *Waggoner Case*.

Far more conclusive, however, is the language in the *Robbins Case* already quoted. In effect Mr. Justice Holmes stated that even though the wife in California had a vested interest in the income, Congress has the power to tax the husband for the whole, for he it is who has the control and the power to pay. This is the situation in Texas. So it is difficult to believe that the Supreme Court will decide otherwise than that the husband in Texas is taxable for the whole of the community income over which he has control, when the question is presented to it and when Congress has expressed an intention so to tax him. As to that class of community income over which the wife has control, such as her personal earnings or the income from her separate realty, by the same reasoning this should be taxable against the wife alone.<sup>12</sup>

It is submitted therefore that the ruling which is soon to be made by the Department of Justice relative to the filing of returns for income of 1925 and probably for 1926, will turn not upon the question of the power of Congress to compel single returns in Texas, but on the intent of Congress to do so. The problem of arriving at *legislative intent* by any method other than by a consideration of the

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<sup>11</sup>70 L. Ed. 67, 46 Sup. Ct. 48 (1925).

<sup>12</sup>Of. 4 TEXAS LAW REVIEW 154, *supra*, note 5.

language used, is an uncertain one, especially in view of the complexity of our legislative machinery with its committees, joint-committees, and the unavoidable effects of filibustering and lobbying. What the original intent of Congress was before the ruling of the Attorney General on August 24, 1920,<sup>13</sup> seems relatively unimportant now. But more important is the question of what weight will be given by the Department of Justice or the court to the contention that Congress in the passage of the Acts of 1921 and of 1924 gave specific consideration to a provision which would tax marital community income as a unit and rejected such provision and that Congress therefore, by the reenactment of the same provision in the Revenue Acts of 1921 and of 1924 after the construction given thereon by the Treasury and the Attorney General, should be presumed to have intended the enactment of laws which had the interpretation and construction placed upon same by executive officers charged with their enforcement. That there is authority for this contention cannot be doubted. In *U. S. v. Falk*<sup>14</sup> this statement is to be found: "The Attorney General having construed the proviso of Section 50 of the Act of 1890 . . . and this construction having been followed by the executive officers charged with the administration of the law, Congress adopted the construction by the enactment of Section 33 of the Act of 1897, and intended no change." This rule has been reiterated in later cases.<sup>15</sup>

Even more significance must be attached to the case of *Provost v. U. S.*,<sup>16</sup> decided on the same day on which the court decided the *Robbins Case*. The question before the court there was the intention of Congress to tax a certain type of transaction on the Stock Exchange. The court said that "the enactment of the Revenue Act of 1918 without material change of the provision in question must, we think, be taken as indicating a purpose to continue in force the existing law as interpreted by the Attorney General." Hence it seems that there is merit to the contention that before a different mode of filing returns can be brought about, there must be a more clearly expressed intent of Congress to require it than is found in any of the acts passed thus far. There has evidently been some doubt, however, in the minds of some members of Congress as to whether the Supreme Court will follow this view. In fear of a contrary construction by the court of the previous acts, which might have a retroactive effect, Congress put into the Revenue Act of 1926 an express provision<sup>17</sup> forestalling any retroactive effect as to those states where separate returns had been permitted, for all years prior to 1925. What implication may arise from this section as to the legislative intent concerning incomes subsequent to 1925 is purely speculative.

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<sup>13</sup>Vol. 32, OPINIONS OF THE ATTORNEY GENERAL 298.

<sup>14</sup>204 U. S. 143, 51 L. Ed. 411, 27 Sup. Ct. 191 (1906).

<sup>15</sup>*U. S. v. Erecedo Hermanos*, 209 U. S. 337, 52 L. Ed. 821, 28 Sup. Ct. 532 (1907); *Ntl. Lead Co. v. U. S.*, 252 U. S. 140 (1919).

<sup>16</sup>70 L. Ed. 138, 46 Sup. Ct. 152 (1926).

<sup>17</sup>Sec. 1212, Revenue Act of 1926.

An early decision by the court on all the issues involved is certainly desirable. That such a decision will be obtained seems unlikely until a change of ruling is made by the Treasury Department, based upon an opinion by the Attorney General. Should such opinion take the position that the law at present requires the filing of a single return of the community income by the husband, in the community property states, then surely the court would have an opportunity to pass upon the question at an early date.

*Sterling C. Holloway.*

**PARTIAL SPECIFIC PERFORMANCE WITH COMPENSATION.**—A vendor who is unable to perform his contract in its entirety can succeed in an action for specific performance if the deficiency is slight. In such case a decree of specific performance will be granted but the purchase price as fixed in the contract will be abated in favor of the purchaser. The principle is "that if he (the purchaser) gets substantially that for which he bargains, he must take a compensation for the deficiency in the value."<sup>1</sup> But when the vendor is unable to give this substantial performance, such relief is denied him.<sup>2</sup> The vendor must also show that he acted in good faith and did not consciously misrepresent his ability to convey.<sup>3</sup>

On the other hand, what are the rights of the purchaser in such a situation, who is not at fault? If the case is of a type in which specific performance would have been granted if the court could have compelled the parties to perform literally,<sup>4</sup> and if he is willing to pay the full purchase price agreed upon in the contract, the purchaser can always insist that the vendor convey as much as he can.<sup>5</sup> As a general rule, he can also usually insist on such conveyance with compensation, or an abatement from the purchase price,<sup>6</sup> for the part that the vendor cannot convey, without regard to whether the performance is substantial and complete,<sup>7</sup> unless the deficiency is so

<sup>1</sup>*Dyer v. Hargrave*, 10 Vesey 505 (Chanc., 1805). This principle has been followed in this country also. The deficiency may be in the quantity or quality of the res, or there may be a slight encumbrance upon it. *PAGE, CONTRACTS*, Sec. 3361; *POMEROY EQ. JURIS*, Sec. 2255.

<sup>2</sup>*Perkins v. Ede*, 16 Beavan 193 (Chanc., 1852); *PAGE, CONTRACTS*, Sec. 3362.

<sup>3</sup>*Towner v. Tickner*, 112 Ill. 217 (1885); *Hammer v. Westphal*, 120 Md. 15, 87 Atl. 488 (1913); *Van Blarcom v. Hopkins*, 63 N. J. Eq. 466, 52 Atl. 147 (1902); *WILLISTON, CONTRACTS*, Sec. 844.

<sup>4</sup>*Morris v. Basnight*, 179 N. C. 298, 102 S. E. 389 (1920).

<sup>5</sup>*Leonard v. King*, 63 Tex. Civ. App. 224, 135 S. W. 742 (1910); *Bahl v. Menger*, 283 Pa. St. 508, 129 Atl. 459 (1925); *PAGE, CONTRACTS*, Sec. 3361; *POMEROY, EQ. JURIS.*, Sec. 2256.

<sup>6</sup>When the purchaser has paid the purchase money, the court makes him refund part as compensation for the partial loss of title. When he has not paid, the court will take an abatement out of the purchase money. *McCreary v. Stallwother*, 212 Ala. 238, 102 So. 52 (1924).

<sup>7</sup>*Cleaton v. Gower*, Cases Temp. Finch. 164 (Chanc., 1674); *Barnes v.*



great as practically to make compensation the main object of the suit.<sup>8</sup> If there is a material deficiency, there is an absence of mutuality of remedy, since as has been seen relief will be given to the purchaser although the vendor, being in default, could not have specific performance. The inability of defendant to have specific performance due to his own default has been recognized as an exception to the requirement of mutuality of remedy,<sup>9</sup> but this requirement is now obsolescent, having been replaced by that of mutuality of performance.<sup>10</sup>

The reasons which have been given for allowing the purchaser to insist on partial performance with compensation are worthy of notice. One given by many of the courts is that the vendor has set up that he has title to all the res which he contracted to sell and is estopped to deny that he has such title.<sup>11</sup> This, however, is not a very satisfactory explanation since the same remedy is allowed against the vendor even when the deficiency resulted after the making of the contract in which case his representation was true at the time it was made.<sup>12</sup> Furthermore, when compensation is allowed the court recognizes that the vendor does not have title to all of the subject-matter.<sup>13</sup> So far as the writer has been able to discover, no Texas case on this subject has based its decision on estoppel.<sup>14</sup>

The true justification of the remedy lies in the great injustice to the purchaser in denying to him such specific relief as is possible, and remitting him, on account of his adversary's breach of contract, to a remedy at law for damages. Equity always regards any remedy looking toward damages for breach of a land sale contract as inad-

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Wood, L. R. 8 Eq. 424 (1869); *Robinson v. Shepherd*, 137 Va. 687, 120 S. E. 265 (1923); *Walling v. Kinard*, 10 Tex. 508 (1853); *Austin v. Ewell*, 25 Tex. Supp. 403 (1860); *Roberts v. Lovejoy*, 60 Tex. 253 (1883); *Hazzard v. Morrison*, 104 Tex. 589, 143 S. W. 142 (1912); *Ward v. Walker*, 159 S. W. 320 (Tex. Civ. App., 1913. Writ of error denied).

<sup>8</sup>POM. EQ. JURIS., Sec. 2256. But relief has been given in extreme cases. *Jones v. Evans*, 17 L. J. Ch. 469 (1848) (seller had only 2/21 of the res instead of  $\frac{1}{2}$ ); *Bass v. Gilliland*, 5 Ala. 761 (1843) ( $\frac{1}{3}$  of the res); *Bogan v. Daughdrill*, 51 Ala. 312 (1874) ( $\frac{1}{3}$  of the res); *Napier v. Darlington*, 70 Pa. St. 64 (1871) ( $\frac{2}{3}$  of the res).

<sup>9</sup>*Palmer v. Gould*, 144 N. Y. 671, 678, 39 N. E. 378 (1895).

<sup>10</sup>Ames: "Mutuality in Specific Performance," 3 COL. L. REV. 1; Durfee, "Mutuality in Specific Performance," 20 MICH. L. REV. 289.

<sup>11</sup>*Rudd v. Lascelles*, L. R. (1900), 1 Ch. 815; *Weatherford v. James*, 2 Ala. 170 (1841).

<sup>12</sup>*Bass v. Gilliland*, 5 Ala. 761 (1843); *Brown v. Ward*, 110 Ia. 123, 81 N. W. 247 (1899).

<sup>13</sup>25 HARV. L. REV. 731.

<sup>14</sup>In the case of *Roberts v. Lovejoy*, 60 Tex. 253 (1883), there was some discussion of the fraud upon the purchaser although no attempt was made to base the decision on that ground, the court merely saying that it was immaterial whether the vendor knew that his statements were untrue or not, since in either event it was a fraud upon the purchaser.

quate,<sup>15</sup> and the purchaser should get this relief so that the necessity of looking to damages as a remedy may be reduced to a minimum. On the other hand it is usually of comparatively slight hardship to a vendor when he is made to convey part of the subject-matter on approximately the basis contracted for. The argument of hardship has a peculiar force in this state on account of the rule which limits sharply the damages recoverable by the purchaser for the vendor's failure to convey because of inability to make title. Only the purchase money paid, plus expenses can be recovered with no damages for loss of the bargain unless the vendor either wilfully or fraudulently fails or refuses to comply with his contract to convey.<sup>16</sup>

It must be recognized that, in granting this relief, the courts, in the interests of justice, are enforcing obligations which are different from those imposed upon the parties by the contract. When the hardship which would result to the vendor from performance is greater than the injustice which would result to the purchaser from a denial of it, then these interests of justice will not be attained and the remedy should be denied.<sup>17</sup>

The usual method of computing the compensation which is allowed the purchaser for a deficiency in quantity is to deduct a sum which bears the same proportion to the whole price as the amount of the deficiency bears to the whole area agreed to be conveyed.<sup>18</sup> If, however, the deficiency is not in quantity but in quality, the amount of the lessening in value due to the deficiency will be deducted, as the value of a house which both parties supposed to be on the premises, but which actually was not.<sup>19</sup> But in a case where the land was of lower quality than that contracted for, the actual value of the land conveyed was determined to ascertain the price to be paid by the purchaser.<sup>20</sup> When the outstanding interest is one of inchoate dower in the wife of the vendor, various methods have been used by the courts which have granted partial performance. Usually the present cash value of the right of dower is determined and that amount is subtracted from the purchase price.<sup>21</sup> But the purchaser

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<sup>15</sup>*Kitchen v. Herring*, 42 N. C. 178 (1851); *Burnett v. Mitchell*, 158 S. W. 800 (Tex. Civ. App., 1913); CLARK, PRINCIPLES OF EQUITY, Sec. 42.

<sup>16</sup>*Sutton v. Page*, 4 Tex. 142 (1849); *Hall v. York*, 22 Tex. 641 (1859); *Wheeler v. Styles*, 28 Tex. 240 (1866); *Garcia v. Yzaguirre*, 213 S. W. 236 (Tex. Comm. App., 1919).

<sup>17</sup>*Durham v. Legard*, 34 Beavan 611 (Chanc., 1865); *Burnett v. Mitchell*, 158 S. W. 800 (Tex. Civ. App., 1913. Writ of error refused). In the latter case the contract called for a conveyance of several tracts of land by the defendant. One tract was the homestead and the wife refused to join in the deed. The vendor was refused specific performance with compensation for the inability to convey the homestead.

<sup>18</sup>*Walling v. Kinard*, note 7, *supra*; *Hazzard v. Morrison*, note 7, *supra*; *Ward v. Walker*, note 7, *supra*; *McCreary v. Stallworth*, 212 Ala. 238, 102 So. 52 (1924); 36 Cyc. 742.

<sup>19</sup>*Austin v. Ewell*, note 7, *supra*.

<sup>20</sup>*Roberts v. Lovejoy*, note 7, *supra*.

<sup>21</sup>This cash value of the inchoate right of dower is usually determined by

has been allowed to retain or to have set aside a sufficient portion of the purchase money as an indemnity, which the husband will receive in case the dower interest does not vest.<sup>22</sup>

Most courts will refuse to decree partial performance with compensation when in their opinion it is too difficult to fix the proper compensation. Such was the case of *Rudd v. Lascelles*,<sup>23</sup> where the land was found to be burdened with restrictive covenants and the court denied relief because there was no way of determining with any degree of accuracy what a reasonable compensation would be. Many courts also refuse to grant compensation for the dower interest of the wife because of this difficulty,<sup>24</sup> but others have refused to recognize that this situation presents an insurmountable difficulty.<sup>25</sup>

Another situation in which many of the courts have refused to grant the remedy to the purchaser has arisen where he knew or should have known of the defect in the title of the vendor at the time the contract was made,<sup>26</sup> or where he had constructive notice of the defect.<sup>27</sup> It is interesting to notice at this point that the Texas courts have ignored the question as to whether the purchaser had or should have had notice of the defect and have thus tacitly disagreed with the great weight of authority and occupy almost a unique position.<sup>28</sup> In *Ward v. Walker*<sup>29</sup> the land which was the subject-matter

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the use of mortality tables. *Feldman v. Lisansky*, 239 N. Y. 81, 145 N. E. 746 (1924).

<sup>22</sup>*Bradford v. Smith*, 123 Ia. 41, 98 N. W. 377 (1904), (no interest paid to husband); *Wannamaker v. Brown*, 77 S. C. 64, 57 S. E. 665 (1907) (interest paid).

<sup>23</sup>Note 11, *supra*.

<sup>24</sup>*Humphrey v. Clement*, 44 Ill. 299 (1867); *Riesz's Appeal*, 73 Pa. St. 485 (1873).

<sup>25</sup>The majority of courts have granted the relief in such situations refusing to recognize both the difficulty of compensation argument and the objection that the remedy would work an indirect coercion of the wife, which has been advanced by many of the courts. The coercion objection has been criticized. 25 HARV. L. REV. 731. The majority view is supported by: *Maas v. Morgenthau*, 136 App. Div. 359, 120 N. Y. S. 1004 (1910), discussed in 70 CENTR. L. J. 282; *Feldman v. Lisansky*, note 21, *supra*; *McNeill v. McNeill*, 61 Utah 141, 211 Pac. 988 (1922); POM. SPEC. PERF., Sec. 460.

<sup>26</sup>*Dyer v. Hargrave*, note 1, *supra*; *Castle v. Wilkinson*, L. R. 5, Ch. App. 534 (1870); *Franz v. Orton*, 75 Ill. 100 (1874); *Horseth v. Fugleston*, 205 N. W. 607 (Minn., 1925); *Peeler v. Levy*, 26 N. J. Eq. 330 (1875); *Elwood v. Smith*, 95 N. J. Eq. 195, 122 Atl. 889 (1923); *Hughes v. Hadley*, 96 N. J. Eq. 467, 126 Atl. 33 (1924); *Rabinowitz v. Rooney*, 128 Atl. 882 (N. J. Ch., 1925); *Lucas v. Scott*, 41 Oh. St. 636 (1885); PAGE, CONTRACTS, Sec. 3357; POM. EQ. JURIS., Sec. 2256; POM. SPEC. PERF., Sec. 442; WILLISTON, CONTRACTS, Sec. 1436.

<sup>27</sup>*James v. Lichfield*, L. R. 9 Eq. 51 (1869); *Maturi v. Fay*, 96 N. J. Eq. 472, 126 Atl. 170 (1924), criticized in 23 MICH. L. REV. 535; POM. SPEC. PERF., Sec. 443.

<sup>28</sup>*Kelly v. Walker*, 91 Mich. 212, 51 N. W. 934 (1892), ignores the knowledge of the purchaser in much the same way.

<sup>29</sup>Note 7, *supra*.

of the contract was owned by five tenants in common with undivided interests. Only four of these signed the contract to convey, but all five were named in the contract as vendors. It was found by the court that it was intended and contemplated by the parties that the vendor not signing should execute for himself and that no authority had been given to sign the contract for him. This amounted to a finding that the purchaser knew or should have known that the vendors signing the contract were unable to convey the whole of the property. Nevertheless the court granted partial performance with compensation for the deficiency caused by the failure of the other vendor to convey. In *Hazzard v. Morrison*<sup>30</sup> the purchaser knew or should have known that the defendant vendor was unable to convey the whole of the land, but performance as to the part she could convey was granted with an abatement of the purchase price for the deficiency. In both of these cases the courts if so minded could have followed other jurisdictions and refused to grant the purchaser the relief on the ground of his knowledge of the defendant's state of title, but it ignored this consideration. In order to determine whether this stand is justified it will be necessary to examine the reasons which have been given as to why such knowledge should defeat the purchaser. Naturally those courts which have used estoppel as the basis for their decision against the vendor,<sup>31</sup> need little argument to defeat a purchaser with actual notice or such notice as would have put a reasonable man upon inquiry, since the purchaser either did not rely, or was not justified in relying, upon the representations of the vendor. Other reasons are that the offer of the purchaser was probably less because he knew of the defect and to award him compensation would give a double allowance;<sup>32</sup> that it would be unconscionable for the purchaser to insist on a strict compliance with the terms of the contract when he knew that the ability of the vendor to so comply was improbable;<sup>33</sup> that the purchaser was willing to take his chances of securing full compliance;<sup>34</sup> and that there is less hardship in denying this extraordinary relief to a purchaser with knowledge of the hazard attending the vendor's ability to perform, than to a purchaser without such knowledge.<sup>35</sup> From this review of the reasons it would seem that the Texas courts are justified in refusing, or rather failing, arbitrarily to deny the purchaser the relief sought solely because he knew, or should have known, of the defects. His knowledge, or lack of it, should be merely one factor in determining the amount of hardship that he would have to suffer if the relief were refused, and it may be that the Texas courts would consider the question of knowledge to this extent.

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<sup>30</sup>Note 7, *supra*.

<sup>31</sup>Note 11, *supra*.

<sup>32</sup>*Dyer v. Hargrave*, note 1, *supra*.

<sup>33</sup>Note 26, *supra*.

<sup>34</sup>*Kuratli v. Jackson*, 60 Ore. 203, 118 Pac. 192 (1911).

<sup>35</sup>25 HARV. L. REV. 731.



*Williams v. Pearman*<sup>36</sup> was a Texas case in which the plaintiff who was able to carry out his part of a contract which called for an exchange of land sued for partial performance with compensation, since the defendant was unable to convey all that the agreement called for on his part. By the terms of the original contract defendant would have received notes executed by the plaintiff, but he would have had to respond to a judgment in case the contract were enforced as requested by the plaintiff. The court reasoned that this feature would be harsh and oppressive on the defendant and would be enforcing a contract which he did not make and probably would not have made, and therefore refused the relief prayed for. Some cases in other jurisdictions have reached the same result,<sup>37</sup> but it seems that the weight of authority is contra.<sup>38</sup> It is believed that no arbitrary rule can be laid down as to whether this relief will be granted or not in case of exchange of lands. This again should be only a factor to consider in determining the amount of hardship on the defendant if the relief is granted, and on the plaintiff if it is refused.

*Henry Grun.*

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<sup>36</sup>164 S. W. 43 (Tex. Civ. App., 1914).

<sup>37</sup>*Olson v. Lovell*, 91 Cal. 506, 27 Pac. 735 (1891); *Ryan v. Evans*, 195 Ind. 570, 145 N. E. 6 (1925), criticized in 9 MINN. L. REV. 386, and 3 WIS. L. REV. 173; *Sternberger v. McGovern*, 56 N. Y. 12 (1874); *Saberski v. Velosky*, 25 Abbott's New Cases 185, 11 N. Y. S. 668 (1890).

<sup>38</sup>*Beck v. Bridgman*, 40 Ark. 382 (1883); *Park v. Johnson*, 86 Mass. 259 (1862); *Mundy v. Irwin*, 20 N. M. 43, 145 Pac. 1080, ANN. CAS. 1918 D. 713 (1915), and cases cited in note.

## RECENT CASES

**CONSTITUTIONAL LAW—EX POST FACTO LAWS—CHANGES IN PROCEDURAL LAW.**—The Ohio Legislature repealed a law providing that applications for separate trial by persons jointly accused should be granted as matter of course, and readopted the common law practice of allowing the judge to grant such applications in his discretion after hearing. Defendants had been jointly indicted for embezzlement committed before the passage of this act. From the action of the State Court denying their application for separate trial, the defendants appealed to the Supreme Court of the United States, alleging that in its application to them the repealing law was *ex post facto*. *Held*, that the act was a reasonable regulation of procedure, depriving the defendants of no substantial protection, and not *ex post facto*, *Beazell v. Ohio*, 46 Sup. Ct. 68 (1925).

Under the standard classification, *ex post facto* laws, prohibited by the national and state constitutions alike, are laws relating to the punishment of crime that (1) make an act, innocent when done, punishable as a crime, (2) increase the gravity of an already committed crime, (3) change and increase the punishment of a crime already committed, and (4) change the rules of evidence to require less or different testimony than was required when the offense was committed. *Calder v. Bull*, 3 Dall. 386, 1 Law. Ed. 648 (1798); *Holt v. State*, 2 Tex. 363 (1847).

In the case under review, the question recurs as to what procedural changes are *ex post facto*. The above classification has no reference to procedural law, and the spirit of the constitutional provisions and of the classification must control the answer to this question. It is said that there can be no vested right in a mode of procedure, and retroactive measures have been upheld where they change the qualification of jurors; *Gibson v. Mississippi*, 162 U. S. 565, 40 L. Ed. 1075, 16 Sup. Ct. 904 (1896); the place of trial; *Gut v. Minnesota*, 9 Wall. 35, 19 L. Ed. 573 (1869); the number of judges; *Duncan v. Missouri*, 152 U. S. 377, 38 L. Ed. 485, 14 Sup. Ct. 570 (1894). Laws that deprive the accused of substantial rights are *ex post facto*, such as a law reducing the number of jurors, *Thompson v. Utah*, 170 U. S. 343, 42 L. Ed. 1061, 18 Sup. Ct. 620 (1898); or denying a previously admissible defense, *Kring v. Missouri*, 107 U. S. 221, 27 L. Ed. 506, 2 Sup. Ct. 443 (1882). A law permitting the introduction of previously inadmissible evidence is valid, provided it does not reduce the amount of evidence required or the ultimate facts necessary to be proved to obtain conviction. *Thompson v. Missouri*, 171 U. S. 380, 43 L. Ed. 204, 18 Sup. Ct. 922 (1898); *Mrous v. State*, 31 Tex. Cr. App. 597, 21 S. W. 764, 37 Am. St. Rep. 834 (1893). Where, however, the newly admissible evidence is the *sine qua non* for conviction, it has been held that the law admitting it deprives the defendant of a substantial immunity and is *ex post facto*. *Frisby v. U. S.*, 38 App. D. C. 22, 37 L. R. A. (N. S.) 96 (1912). To reject evidence, thus made available, because of substantial hardship to the accused, is to reject the principles of *Thompson v. Missouri*, *supra*; and, under the sweeping language of the principal case, no procedural change is valid that alters the position of a man accused of crime substantially to his detriment. Assuming that the denial of separate trial as of right worked no substantial hardship, the court holds the change valid. Taken at face value, the language of Mr. Justice Stone leaves the determination of the *ex post facto* feature of procedural laws to no criterion save the conscience of the court. The

spirit of the constitutional provisions is that no man shall be prejudiced as to his past offenses by changes in the law. It is evident that procedural changes may assume such importance as to determine conviction. The decision indicates that the proper criterion is whether the accused has been substantially injured.

J. C.

**CRIMINAL LAW—HOMICIDE—KILLING OF WIFE TAKEN IN ADULTERY NOT JUSTIFIED.**—Defendant came upon his wife and a man under circumstances that strongly indicated that they were about to engage in the act of adultery. Defendant killed both his wife and her paramour and was prosecuted for the murder of his wife. *Held*, that Art. 1220, CODE CR. PROC. 1925, does not justify a husband in killing his wife when he finds her in adultery. *Billings v. State*, 277 S. W. 687 (Tex. Cr. App., 1925).

In making their decision the court overruled holdings to the contrary in *Williams v. State*, 73 Tex. Cr. Rep. 480, 165 S. W. 583 (1914), and *Cook v. State*, 78 Tex. Cr. Rep. 116, 180 S. W. 254 (1915). In both reasoning and conclusion the court reached the result advocated in 2 TEXAS LAW REVIEW 111.

J. N. J.

**DEEDS—REPUGNANCY BETWEEN GRANTING AND HABENDUM CLAUSES.**—The granting clause purported to convey the land in fee simple while the habendum clause provided that "all minerals in and on said land, together with the right of way for convenient access thereto, are reserved and excepted from this grant and conveyance." *Held*, that the rule of construction which declares an exception void if repugnant to the granting clause, does not apply, for there is no repugnancy unless the granting clause is as specific in the description of the thing granted, as the words of the exception. *Associated Oil Co. v. Hart*, 277 S. W. 1043 (Tex. Comm. App., 1925).

An exception in a deed may operate to retain the present legal title to the minerals in the grantor. *State Oil Corp. v. Ward*, 236 S. W. 446 (Tex. Comm. App., 1922). Or the title to the same may be conveyed by an instrument which purports to pass no other interest. *Texas Co. v. Daugherty*, 107 Tex. 226, 176 S. W. 717 (1915). The primary object in construing all deeds is to carry out the intention of the grantor as evidenced by the instrument. *Simonton v. White*, 93 Tex. 50, 53 S. W. 339, 77 Am. St. Rep. 824 (1899). A corollary of this rule is that a deed be construed most strongly against the grantor. *Glen Rose Collegiate Institute v. Glen Rose Independent School*, 58 Tex. Civ. App. 435, 125 S. W. 379 (1910). Or more specifically, that if a deed is susceptible of two constructions, the one most favorable to the grantee be adopted. *Cartwright v. Trueblood*, 90 Tex. 535, 39 S. W. 930 (1897); *Rettig v. Houston West End Realty Co.*, 254 S. W. 765 (Tex. Comm. App., 1923). The application of these principles will inevitably result in the doctrine, that if a grantor conveys lots one, two, three and four in block five, by name, except lot one, the exception is repugnant to the grant; but if he conveys by general description, such a block five, except lot one of said block, the exception limits the description of the premises in the grant, and is not repugnant. *Koenigheim v. Miles*, 67 Tex. 113, 2 S. W. 81 (1886). Thus the exception of a seventy-one acre tract by metes and bounds is not repugnant to the grant of a larger tract by general description. *Watkins v. Tucker*, 84 Tex. 428, 19 S. W. 570 (1892). The grant of a tract of land in fee simple, reserving the right to hold the possession until a certain event, is not repugnant to the grant. *Word v. Kuydendall*, 246 S. W. 757 (Tex.

Civ. App., 1922). The granting clause conveyed land to A, B, and C in trust for D, and the habendum attempted to convey to A, B, and C in trust for D and themselves forever, and as the latter was irreconcilable with the former, it was repugnant. *Moore v. City of Waco*, 85 Tex. 206, 20 S. W. 61 (1892). In dedication cases an exception which is not explicitly repugnant to the grant, but is inconsistent with public policy, is invalid. *Roaring Springs Town-Site Co. v. Paducah Telephone Co.*, 109 Tex. 452, 212 S. W. 147 (1919). Although the question of repugnancy was not raised the courts have upheld exceptions of substantially the same language as that of the present case. *Luse v. Parmer*, 221 S. W. 1031 (Tex. Civ. App., 1920); *Luse v. Boatman*, 217 S. W. 1096 (Tex. Civ. App., 1919). The present case is not only commendable, as founded on sound principles, but is supported by authority.

J. W. M., Jr.

**EVIDENCE—ERRORS IN ADMISSION OF EVIDENCE AS AFFECTED BY FAILURE TO EXCEPT.**—In a prosecution for violation of a federal criminal statute, copies of income tax reports were admitted in clear violation of the best evidence rule. No exception was taken to the court's action in overruling proper objection and admitting the evidence. *Held*, "the only object of an exception is to clearly challenge the attention of the court to an alleged error," that proper objection constituted such challenge, that taking exception in such a case is a relic of the formal procedure of the past and is now idle, and that "failure to take it does not waive the objection." *Corliss v. United States*, 7 Fed. (2d) 455 (U. S. Cir. Ct. App., 1925).

Exception is meant herein as the mere statement, "I except," made by counsel after an adverse ruling of the court. It is to be distinguished from the bill of exceptions, which in modern practice is usually drawn up at some convenient time after the presentation of the evidence. But see Rules for the District and County Courts, No. 60, HARRIS' RULES OF THE COURTS.

It is a well settled rule that errors in ruling of the trial court as to the admissibility or inadmissibility of evidence cannot be reviewed on appeal unless due exception was taken, and mere objection, not followed by exception, is insufficient to preserve the question for review. 3 C. J. 912-914, and 2 Cyc. 721-723, and cases therein cited. This has always been the rule in Texas. *Collins v. Panhandle National Bank*, 75 Tex. 254, 11 S. W. 1053 (1889); *Olcott v. Squires*, 144 S. W. 314 (Tex. Civ. App., 1912); also see Rules for the District and County Courts, Nos. 55-60. And heretofore this has been the rule in the federal courts. *Laber v. Cooper*, 7 Wall. 565, 19 L. Ed. 151 (1868); *Gibson v. Luther*, 196 Fed. 203, 116 C. C. A. 35 (1912).

The exception originally served two purposes: first, to call the attention of court and counsel to the precise error alleged, and second, to cause the terms and circumstances of the matter to which exception was taken to be immediately entered of record. WIGMORE ON EVIDENCE, 2nd Ed., Sec. 20.

Proper objection serves the purpose of challenging the attention of court and counsel to the alleged error. An exception, in this particular situation, is merely another objection. It seems the first objection should challenge attention as well and as completely as the second. However, the answer offered to such reasoning is that objection and exception are not the same, WIGMORE ON EVIDENCE, 2nd Ed., Sec. 20, that objection is made to an offer of evidence while an exception is taken to an adverse ruling of the court on the objection. This reasoning may have some force in the situation where the objection is made by one party to evidence offered, and the evidence is excluded, and exception is taken by the other party, because in such a case objection and exception clearly serve different purposes. But it is difficult to see the soundness of the argument when applied to the only situation which the rule of the principal case is meant to meet, that is, where objection



and exception are to be taken by the same party. In this situation, a bill of exceptions is a memorial of objections and could be based as properly upon the objection as upon the exception.

As to the second reason for the rule requiring the exception, that is, the necessity of calling for an immediate record of the objection, suffice it to say that the modern practice is to have a stenographic record of the evidence, objections, and rulings at trial regardless of the taking of exceptions. From such a record bills of exception can be correctly drawn at a time which will not inconvenience the due dispatch of the court's business. In those courts where this practice does not obtain, this reason for the rule may still exist. But in all federal courts and in most state courts, where this is the practice, this reason for the rule has ceased to exist.

Although the court in reasoning that an exception to an adverse ruling should be implied from a previous objection to the admission of evidence has taken a unique position, yet the holding is justified under the maxim that, when the reasons for a rule cease, the rule should cease.

H. T. M.

FEDERAL PROCEDURE—EQUITY PRACTICE—COMPULSORY JOINDER OF PARTIES PLAINTIFF.—The owner of a patent, who had assigned the use of same to the plaintiff was out of the jurisdiction of the court, and refused to join in a suit for infringement of the patent rights. *Held*, that the owner of the patent could be joined as a party plaintiff, against his will; his joinder being indispensable, not only to give jurisdiction under the patent laws, but to prevent a multiplicity of suits. *Independent Wireless Tel. Co. v. Radio Corp. of America*, 46 Sup. Ct. 166 (1926).

At common law where a chose in action was assigned the action had to be maintained in the name of the original obligee. *Jarman v. Howard*, 10 Ky. 383, 3 A. K. Marshall 383 (1820). And where a joint owner was not made a party to a suit to recover chattels the action would fail. *Boulton v. Cuthbert*, 132 Ala. 403, 31 So. 358 (1902). If the joint owner refused to join, the common law permitted the use of his name against his consent. *Sweigart v. Berk*, 8 Searg. & Rawles 308, 311 (Pa., 1822). The fact that he is a non-resident, and refuses to join, is no excuse for not joining him as a co-plaintiff; the plaintiffs having a right to so join him, on indemnifying him against costs, even against his consent. *Boulton v. Cuthbert*, *supra*. Or, upon his refusal to join, the plaintiff may properly make him a party defendant even though his interests are identical with the complainants. *Roby v. So. Park Comrs.*, 252 Ill. 575 (1911), affirmed, 238 U. S. 610, 59 L. Ed. 1488, 35 S. C. 791 (1914).

The general rule in equity is, that all parties whose interests may be materially affected by a decree, must be before the court to enable it to act. *Tobin v. Walkinshaw*, 1 McAll. 26, 23 Fed. Cases 14068 (1855). Where parties named as complainants in a bill in equity are joined without their knowledge or assent the bill as to them should be dismissed. *Gravenstine's Appeal*, 49 Pa. (13 Wright) 310 (1865).

But the assignee of a promissory note can maintain an equity suit in his own name. *Lenox v. Roberts*, 2 Wheat. 373, 4 L. Ed. 264 (1817). And the assignee has even been permitted to maintain suit against the obligee, who has become the administrator of the assignor. *Hodge v. Cole*, 140 Mass. 116 (1885). Thus where an entry upon government mining land was made by A, for the benefit of B, B having paid the consideration; but the application was so worded that it appeared that A, made entry for his own benefit, B, was allowed to sue as "assign" in his own name though he had only an equitable assignment. *U. S. v. Colorado Anthracite Co.*, 225 U. S. 219, 56 L. Ed. 1063 (1912).

Under U. S. COMP. STAT. 9464, 16 STAT. AT L. 207, and U. S. COMP. STAT. Sec. 9468, under which the principal case was decided, the patentor must maintain the suit for the license. *Clement Mfg. Co. v. Upson*, 40 Fed. 471 (1889). However, the licensee receives the benefits of the suit. *Davey Tree Expert Co. v. Van Billiard*, 248 Fed. 718 (1918). If the patentee cannot be found, or is hostile, or is out of the jurisdiction, the licensee may sue, as at law, in the name of the patentee. See *Wilson v. Chickering et al.*, 14 Fed. 917 (1883). And, of course, the licensee may prosecute in his own name against the patentee. *Littlefield v. Perry*, 21 Wall. 205, 22 L. Ed. 577 (1874); *Adriance, Platt & Co. v. McCormick Harvesting Mach. Co. et al.*, 55 Fed. 287 (1893). The instant case seems clearly correct in holding, that, in equity, if the licensor is out of the jurisdiction of the court, and refuses to join in a patent infringement suit at the request of the licensee, the licensee has prima facie implied authority by virtue of his license to join the licensor, without his consent, as a party plaintiff; especially so where the latter is without the jurisdiction of the court, and cannot be served as a party defendant. *Brush-Swan Elec. Co. v. Thompson-Houston Elec. Co.*, 48 Fed. 224 (1891), approved, *Brush Elec. Co. v. Calif. Elec. Co.*, 52 Fed. 945 (1892), affirmed, 49 Fed. 73 (1892), and *Excelsior Co. v. Allen*, 104 Fed. 553 (1900).

C. S. E.

**FRAUD—FALSE REPRESENTATIONS INDUCING THE CONTRACT—MEASURE OF DAMAGES.**—The defendant made false representations concerning the value of his land, inducing the plaintiff to enter into a contract of exchange which was signed by the parties in November, 1921. *Held*, where property has been exchanged the rule of damages for fraud is the difference between the value of the land given, and that received. *White v. Carlton*, 277 S. W. 701 (Tex. Civ. App., 1925).

Two other Civil Appeals cases following the rule adopted in the principal case, where the cause of action accrued after 1919, are *Carver v. Moore*, 275 S. W. 90, and *Loveless v. Johnson*, 274 S. W. 658, both of which were decided in 1925. All of the above cases cite and follow the rule as stated in *George v. Hesse*, 100 Tex. 44, 93 S. W. 107 (1906), the damages being measured, not by what the plaintiff might have gained, had the statement been true, but what he had lost.

The Legislature, in 1919, evidently in order to change the rule as stated in *George v. Hesse*, enacted what is now Art. 4004, TEX. REV. CIV. STAT., 1925, which declares that in "transactions in real estate where there is actionable fraud, . . ." the rule of damages shall be "the difference between the value of the property as represented or as it would have been worth had the promise been fulfilled, and the actual value of the property . . . delivered." It is submitted that the Courts of Civil Appeals have disregarded this positive enactment by following *George v. Hesse* in cases where the cause of action accrued after the passage of this statute. In *Booth v. Coward*, 265 S. W. 1026 (Tex. Comm. App., 1924), the cause of action arose prior to 1919, and the statute was not there applicable.

The principal case hints at a possible distinction between cases where there is a purchase of land, and an exchange of land by the parties, citing Art. 4004, which relates to *transactions* in real estate, and immediately following it, saying "where property has been exchanged the measure of damages is the difference in the value of the land given and that received," citing *George v. Hesse*, *supra*. No other case has suggested a difference between a sale and an exchange, nor does the statute warrant it under the ordinary rules of construction. That the word "transaction" includes an exchange would follow from the definition and general understanding of the word. *Holland v.*

*Nimitz*, 111 Tex. 419 (1922), *Bouv. LAW DICT.*; any such distinction seems untenable, and would serve to defeat the purpose of the act.

J. M. F.

**HOMESTEAD—CONVEYANCE BY HUSBAND AND SUBSEQUENT ABANDONMENT.**—A husband after making a conveyance of the homestead to one Viele, in which his wife refused to join, in good faith acquired a new home and removed his family to it, later executed a deed to another. *Held*, "When he acquired the new home and moved his family thereto intending to make same his home, the deed to Viele became effective as an estoppel against his right to recover the land, and his wife's right in same, being that of homestead only, ceased when the new homestead had been acquired." *Southwestern Lumber Co. of N. J. v. Erans*, 275 S. W. 1079 (Tex. Civ. App., 1925, writ of error dismissed for want of jurisdiction).

The theory of the decisions holding the grantee takes title to the homestead at the time of abandonment is that the husband has conveyed his interest and the wife has abandoned hers. Thus the husband may convey his interest and cause the relinquishment of the wife's, for he may select a new home and her consent is not necessary for abandonment of the old. *Slavin v. Wheeler*, 61 Tex. 654 (1884). Of course, the abandonment must be in good faith and not with the intent to defraud the wife. *Marler v. Handy*, 88 Tex. 421, 31 S. W. 636 (1895), *Stallings v. Hullum*, 89 Tex. 431, 35 S. W. 2 (1896). The acquisition of a new homestead is not absolutely essential where the intent of the husband and wife concur in the abandonment. *Reeves v. Renfro*, 68 Tex. 192, 4 S. W. 545 (1887).

In the principal case the attempted transfer by deed of the husband, was effective as a present conveyance, and this is generally true whether the land designated as the homestead is his separate or their community property. The circumstances which showed that the wife either willingly abandoned or that another homestead was acquired, whereby the wife's privilege or interest was protected, simply enlarged the power of the husband to presently convey. It is believed that the doctrine of estoppel has no application in furnishing a sound basis for this decision.

A. J. E.

**HOMESTEAD—RIGHT OF HUSBAND TO CONVEY HOMESTEAD WITHOUT WIFE JOINING WHERE WIFE IS INSANE.**—Suit by husband and wife, through next friend, to set aside a conveyance of their community homestead, jointly executed by them, but at a time when the wife was insane. *Held*, that a married man, whose wife is insane, can convey their community homestead without her consent; hence the deed by J. M. Gambill and wife in the present case was valid. *Reynolds Mortgage Co. v. Levi Gambill, next friend* (Tex. Comm. App., 1926. Not yet reported).

The question of whether a married man can convey the community homestead without the wife's consent, she being insane, has arisen in five different appealed cases in Texas. Two cases, decided by Courts of Civil Appeals, hold the same as the instant case. *Shields v. Aultman*, 20 Tex. Civ. App. 345, 50 S. W. 219 (1899); *Giley v. Troop*, 146 S. W. 954 (1912). One Court of Civil Appeals' case is contra. *Priddy v. Tabor*, 189 S. W. 111 (1916) (writ of error granted, but case withdrawn before being decided by the Supreme Court). In a recent case, the Supreme Court decided that a conveyance of the community homestead by a married man, who had been appointed administrator of the community property, was valid even though not joined by the wife, she being insane at the time. *Green v. Windham*, 278 S. W. 1101 (Tex. Sup. Ct., 1926). However, as pointed out by Judge



Speer in his opinion in the principal case, the fact that the husband was an administrator in the *Green Case* made no difference because under our laws the homestead forms no part of the estate of a deceased or an insane spouse for administration. *Zuerneman v. Von Rosenberg*, 76 Tex. 522, 13 S. W. 485 (1890); *Lacy v. Lockett*, 82 Tex. 190, 17 S. W. 916 (1891).

Briefly, the line of reasoning in these cases is as follows: The restrictions put upon conveyances of community homesteads were not meant to increase the wife's property rights therein, but to give her the personal privilege of preventing the sale of same by refusing to consent thereto; that such restrictions were meant to operate in normal cases where the wife was capable of giving such consent; that, when the wife became insane, she could no longer exercise this personal privilege of consent and the appointment of a guardian for her estate and his joining in the transaction would no more give her personal consent that she herself, while insane, could give; that since the law does not require the impossible, and it is impossible to get the legal consent of an insane woman, the law will not require the wife's consent in such cases. The result seems to be a very practical and commendable one.

R. L. H.

**INSURANCE—RIGHTS OF A PUTATIVE WIFE IN A FRATERNAL BENEFIT CERTIFICATE.**—A, being lawfully married to B, deserted her and went through a ceremony of marriage with C who knew nothing of his existing marriage. A, after his marriage with C, took out a policy of life insurance in a fraternal benefit company, naming C, "his wife," as the beneficiary. Upon the death of A, the proceeds of the policy were paid into court and this action brought to determine whether they belonged to B or C. *Held*, that C was a wife within the meaning of Art. 4831, REV. CIV. STAT., 1925, and entitled to the proceeds of the policy. *Mendez v. Mendez*, 277 S. W. 1055 (Tex. Comm. App., 1925).

Cases of this nature have arisen quite frequently in common law states. *Note*, 47 L. R. A. (N. S.), 252. Under the common law the second marriage of A is null and void, and C would acquire no civil rights thereby regardless of her good faith. *Thomas v. Thomas*, 124 Pa. 646, 17 Atl. 182 (1889); *Fenton v. Reid*, 4 Johns. 52, 4 Am. Dec. 244 (N. Y., 1809). In those states where the beneficiary is not required to have an insurable interest in the life of the deceased, there is no objection to C taking under the policy. *Brogi v. Brogi*, 211 Mass. 512, 98 N. E. 573 (1912). Where an insurable interest is required C is usually allowed to take as a dependent. *Senge v. Senge*, 106 Ill. App. 140 (1903). The rule of the common law seems to be that C must establish her right to take upon some ground other than her marital relation. Also, where the policy is payable to the "wife" or "widow" without naming the party intended only the lawful wife can take. *Kinney v. Telephone Co.*, 222 S. W. 227 (Tex. Comm. App., 1920); *Tutt v. Jackson*, 87 Miss. 207, 39 So. 420 (1905); *Bolton v. Bolton*, 73 Me. 299 (1882).

The rights of a putative wife to one-half of the property acquired by the joint efforts of her husband and herself are recognized and enforced in Texas. *Routh v. Routh*, 57 Tex. 589 (1882); 1 TEXAS LAW REVIEW, 469. The court in the present case rests the right of C to take under the policy upon the ground that the term "wife" in Art. 4831, REV. CIV. STAT., 1925, includes a putative wife. The main distinction between the present case and the *Kinney Case*, *supra*, is the fact that in the latter case the beneficiary was designated as "wife" without giving her name. If a putative wife comes within the class designated by the statute it would seem to be immaterial whether she be named or not so long as the intention of the insured is clear. It has been said that the Texas statute would be more accurately worded if the terms widow and widower were used instead of wife and husband.



*Appleby v. Grand Lodge*, 225 S. W. 588 (Tex. Comm. App., 1920). The statute would seem to be restrictive in its nature and should be strictly construed. The result reached in the present case seems both fair and equitable, but it would seem that a sounder basis for the decision might be had by placing it upon the ground of dependency. Before the passage of the present legitimacy statute, Texas had permitted an illegitimate child to take as a dependent. *Stahl v. Insurance Co.*, 44 Tex. Civ. App. 203, 98 S. W. 643 (1906). The same reasoning might be applied to a putative wife.

J. D.

**INSURANCE—TRANSPORTATION CLAUSE IN AUTOMOBILE INSURANCE POLICY.**—Plaintiff kept his car in a public garage, and while it was being lowered from the second floor to the first floor of the garage building the cables broke causing the elevator to fall 21 feet, striking the bottom of the elevator shaft with such violence that the car was practically demolished. *Held*, that plaintiff could recover under fire and transportation automobile policy, insuring against perils while automobile was "being transported in any conveyance by land or water, the stranding, sinking, collision, burning, or derailment of such conveyance." *National Fire Ins. Co. of Hartford, Conn. v. Elliott*, 7 Fed. (2d) 522 (1925).

So far as the letter of the policy is concerned, the automobile in question was damaged "while being transported in a conveyance by land" through the "collision" of such conveyance. But it would seem from the words "stranding, sinking, collision, burning, or derailment," that the parties intended the clause above quoted to protect only when the car was being conveyed on a steamship, railroad, or other lateral conveyance. However, it has been held that it was manifestly their intention, by the language used, to cover all conceivable losses to the automobile while it was being transported, and they used the terms "sinking," etc., as an enumeration of the methods by which such loss or damage might occur, rather than a limitation of the liability to the manner of the destruction of the vehicle or means of transportation. *Importers' & Exporters' Ins. Co. v. Jones*, 266 S. W. 286 (Ark., 1924); *American Automobile Ins. Co. v. Fox*, 218 S. W. 92 (Tex. Civ. App., 1919). But it has been argued that the policy covers only a loss occurring while the car was being transported, as a direct result of one of the specified perils. *Cothran, J., dissenting, in Wheeler v. Globe & Rutgers Fire Ins. Co.*, 118 S. E. 609 (Ga., 1923). Another decision, holding that an elevator was not a "conveyance by land or water," within restrictions of the Insurance Law of New York, would seem to construe the transportation clause strictly. *Frieberger v. Globe Indemnity Co.*, 199 N. Y. S. 310 (Sup. Ct., App. Div., 1923). The clause is comparatively new and has seldom been construed by the courts.

The court did not decide in the principal case whether the accident was covered by the collision clause of the policy.

B. M. B., Jr.

**LIMITATION OF ACTIONS—AGREEMENT RENEWING DEBT AFTER STATUTORY BAR—SUFFICIENCY OF MORAL CONSIDERATION.**—A purchased land, executing a promissory note for the purchase money reciting a vendor's lien. The note was subsequently renewed, and finally barred by the four-year statute of limitations. A executed a new note to B, securing the new note by a deed of trust. Upon maturity B sued for recovery on said note, and foreclosure of the lien. *Held*, that despite the running of the statute of limitations, and the statutory "conclusive presumption" of payment, the moral obligation survived and was sufficient consideration for the new promise to pay, reviving the purchase money lien against A's homestead. *Bellamy v. Oklahoma Farm Mortgage Co.*, 278 S. W. 180 (Tex. Comm. App., 1925).

Texas courts have unbrokenly held that the statute of limitations bars the remedy only, and the moral obligation survives and is sufficient consideration for a new promise. *Goldfrank v. Young*, 64 Tex. 432 (1885); *Fievel v. Zuber*, 67 Tex. 275, 3 S. W. 273 (1887); *Nat. Bank of Alvarado v. Lane*, 265 S. W. 763 (Tex. Civ. App., 1924); see 17 R. C. L., 666. The new promise must be in writing, REV. CIV. STAT. 1925, Art. 5539. Adherence to the accepted rule that the moral obligation is sufficient consideration becomes difficult when confronted by a statute which says, "purchase money or mortgage lien notes relating to real estate shall conclusively be presumed to have been paid after four years from the date of maturity. . . ." REV. CIV. STAT. 1925, Art. 5521. Nevertheless, our courts have held that the so-called conclusive presumption does not destroy the moral obligation. *Dunn v. City of Laredo*, 245 S. W. 426 (Tex. Comm. App., 1922), 1 TEXAS LAW REVIEW 353. Although the words upon which that decision is predicated (Art. 5694, REV. CIV. STAT., 1911), are omitted from the statute as it appears in the REV. CIV. STAT. 1925, it may be contended that the Legislature never intended by its "conclusive presumption" to take away a man's right to bind himself upon his just debts, when that right has received such strict protection.

Logically, the instant case is subject to criticism. A debt which is "conclusively presumed" to have been paid can scarcely predicate a moral obligation. But in its emphasis on the obvious moral factor, the case is praiseworthy, and distinctly in line with the policy of previous decisions.

I. M. W.

**LIMITATION OF ACTIONS—PAROL EVIDENCE RULE—RECITAL IN DEED OF PAYMENT OF CONSIDERATION.**—P conveyed to D a tract of land by a deed reciting and acknowledging receipt of \$3000 cash consideration. Three years later P sued D for part of this consideration, alleged to be yet unpaid. D pleaded the two-year statute of limitations on debts not evidenced by written contract and denied any liability on the deed as a written contract. *Held*, the deed, assented to by D, was a written contract, to which the four-year statute of limitations applied, and it was not necessary that it contain in terms a promise or recital of a promise in order to be binding upon him. *Orbeck v. Alfei*, 276 S. W. 947 (Tex. Civ. App., 1925, rehearing withdrawn on motion of all parties).

It is well settled in Texas that the acceptance of a deed by the grantee constitutes it his deed, and he thereby becomes bound in writing for all obligations which the deed expressly or impliedly states that the grantee assumed. *Smith v. Nesbitt*, 111 Tex. 186, 230 S. W. 976 (1921), and that the parol evidence rule does not forbid admission of evidence to show that the consideration named had actually not been paid, though it was recited as received. *Gibson v. Fifer*, 21 Tex. 260 (1858); 5 WIGMORE, EVIDENCE, 2d Ed., Sec. 2433; 3 TEXAS LAW REVIEW, 293; 4 TEXAS LAW REVIEW, 266. The court in the principal case held that the deed was a written contract expressing all the obligations of the parties in connection with the sale, and that if the grantee had not discharged his duty of payment of the consideration named, he was still bound by that obligation. This obligation must be in the nature of a promise implied in fact from the acceptance by the grantee of the deed containing a stipulation for the payment of \$3000 in cash. The court did not regard the recitation of receipt of payment in full in the writing as negating the implied promise, and though this view is perhaps arguable (cf. dissenting opinion in *Fowlkes v. Lea*, 84 Miss. 509, 36 So. 1036, 68 L. R. A. 925, 2 ANN. CAS. 466 (1904)) it seems correct in principle, and is a logical application of the principle first mentioned in this paragraph. The real point of difficulty is that which the court pronounced upon without

hesitation, namely, whether the deed is a contract in writing. The court had before it an oral agreement of sale, a written conveyance of the land by a deed reciting the consideration, and an acceptance of that deed by the grantee. The holding that these three elements combined form a written contract within the meaning of the four-year statute of limitations (Art. 5527, REV. CIV. STAT., 1925) is a new one in this state, but is to be commended as a liberal construction of that statute.

It has been held that the four-year statute applies to the purchaser's obligation on a written order for goods (*Lewis v. Taylor*, 204 S. W. 383 (Tex. Civ. App., 1918)); or to the railroad's obligation on a bill of lading (*Elder, Dempster & Co. v. Railway Co.*, 105 Tex. 628, 154 S. W. 975 (1913)), or on a ticket (*Railway Co. v. Gordon*, 218 S. W. 74 (Tex. Civ. App., 1919)); or of the insured to pay premiums on an insurance policy (*Fidelity & Casualty Co. v. Callaghan & Graham*, 104 S. W. 1073 (Tex. Civ. App., 1907)). In each of these cases there is a promise implied in fact from the writing. To come within the four-year statute the promise implied from the writing must be implied in fact, or representative of the promisor's actual intention to perform. A promise implied in law, where the obligation is by law placed on the party irrespective of his intention, is a quasi-contractual duty, and is held to be within the two-year statute of limitations, though arising out of some transaction based on a contract in writing. *Faires v. Cockrill*, 88 Tex. 428, 31 S. W. 190, 639, 28 L. R. A. 528 (1895); *Dwight v. Matthews*, 94 Tex. 533, 62 S. W. 1052 (1901); *Yndo v. Rivas*, 107 Tex. 408, 180 S. W. 96 (1915).

It should be noticed that the plaintiff in cases of this kind may recover, where it is permissible to add it to the deed, upon a parol promissory or contractual term not referred to in the deed, but that in such case the action would probably be upon the parol promise, and therefore within the two-year statute. The Texas courts have held that such a term may be added where the consideration named in the deed is purely recitative and not contractual. *Coverdill v. Seymour*, 94 Tex. 1, 57 S. W. 37 (1900); 4 TEXAS LAW REVIEW 267. The rule would perhaps reach a sound result more uniformly if contractual terms might be shown by parol in all cases where it can be shown that the deed was not intended to recite the full terms of the consideration, but only part of them, whether the recitation made is recitative or contractual. *G. C. & S. F. Ry. Co. v. Jones*, 82 Tex. 156, 162, 17 S. W. 534 (1891); 5 WIGMORE, EVIDENCE, 2d Ed., Sec. 2430, 2431. The unsettled state of the law on this point would seem to be a sound argument in favor of reciting the true consideration in deeds.

V. E.

OIL AND GAS—PARTITION IN KIND BY OWNER OF MINERAL RIGHTS IN UNDEVELOPED LAND.—Plaintiff, owner of one-half undivided interest in mineral rights in a certain tract of undeveloped land, sued defendant, who subsequent to plaintiff's purchase had acquired the fee and remaining mineral rights, for partition under TEX. REV. CIV. STAT. 1925, Art. 6082, which permits any "joint owner" of any petroleum or gas lands, or of any interest therein, to compel a partition thereof between the other joint owners. *Held*, (1) that as in Texas minerals in place constitute an interest in the realty, plaintiff by virtue of a one-half undivided interest in the mineral rights in the land was a "joint owner" within the statute; (2) that the law favors a partition in kind, and therefore in partitioning the mineral rights in undeveloped land, the court should assume that each acre of land contains an equal amount of minerals, and partition by dividing the surface; (3) the test for compelling partition under the statute is that the interests of the



joint owners generally extend to the whole tract of land, which interests are capable of being severed from the fee, and that the owners have a present right to joint possession, and if these requisites exist the estates are of equal dignity in the sense required under the statute, *Henderson v. Chesley*, 273 S. W. 299 (Tex. Civ. App., 1925).

The court notes that plaintiff was the owner of a one-half undivided interest in all the mineral rights, and not in the oil and gas rights alone. At common law the owner of mineral rights in land was entitled to a partition as of right, regardless of any hardship or inconvenience. Authorities collected in 15 ANN. CAS. 778. The general rule is that all mining property capable of being held in cotenancy is subject to partition by judicial proceedings. *Robbins v. Penn. Gas Coal Co.*, 28 Pa. Co. Ct. 49 (1903). The complainant can secure actual partition in kind unless the situation is such that a probably fair division cannot be had by dividing the surface of the land. *Hughes v. Delvin*, 23 Cal. 501 (1863); *Robbins v. Coal Co.*, *supra*; *McConnell v. Pierce*, 210 Ill. 627, 71 N. E. 622 (1904); *contra*: *Brown v. Challis*, 23 Colo. 145 (1896); *Aspen Mine Smelting Co. v. Rucker*, 28 Fed. 220 (1886). The courts have sometimes remitted the parties to chancery for a sale and division of the proceeds, on the ground that the respective values of the different parts of mineral lands can never be fairly ascertained. *Conant v. Smith*, 1 Aik. 67, 15 Am. Dec. 669 (Vt., 1826). On the same theory, statutes have been enacted in many states providing for a sale and division as of course, but it must be made to appear that an actual division in kind would work hardship before a sale will be decreed. *Wilson v. Bogle*, 95 Tenn. 90, 32 S. W. 386 (1895); *Gulf Refining Co. v. Hayne*, 138 La. 555, 70 So. 509 (1915). In cases involving mineral rights in land which has never been explored, and is not known to contain mineral deposits, as was true in the principal case, the court will decree partition in kind, *Ryan v. Egan*, 26 Utah 241, 72 Pac. 933 (1903); "for to refuse partition on the ground that the land is mineral land would be for the court to enter upon the domain of pure speculation." THORNTON ON OIL AND GAS, 4th Ed., p. 464.

Partition has been denied complainants who were owners of the oil and gas rights alone, on the ground that because of the fugitive nature of oil and gas they are not subject to ownership in place, and therefore do not constitute an interest in the realty. *Hall v. Vernon*, 47 W. Va. 295, 34 S. E. 764, 49 L. R. A. 264 (1899); *Dangerfield v. Caldwell*, 151 Fed. 554 (1907). In some states where such rights are held to constitute an interest in the realty, statutes require sale and division of the proceeds. *Robertson Consol. Land Co. v. Paull*, 63 W. Va. 249, 15 Am. Dec. 775 (1907), and note. In Kansas it is held that the statute providing for partition of realty has no application in a suit for partition by the lessee in an oil and gas lease, the rights under such a lease being there regarded as personalty. *Beardsley v. Kans. Nat. Gas Co.*, 78 Kan. 571, 96 Pac. 859 (1908).

There is dictum in *Medina Oil Development Co. v. Murphy*, 233 S. W. 333 (Tex. Civ. App., 1921), that the holder of the oil and gas rights in land is not entitled to partition as against the owners of the fee, because the estates are not of equal dignity. *Woods v. Rolls*, 268 S. W. 988 (Tex. Civ. App., 1924), cited with approval in the instant case and supporting it, holds that the owner of an oil and gas lease is entitled to partition as against the owner of the fee, where his interest is coextensive with the whole tract, which was not true in the *Medina Case*.

In the principal case the court intimates that its decision might have been different had the land in question been developed or known to contain minerals. There are dicta in *Lenfers v. Henke*, 73 Ill. 405, 24 Am. Rep. 263 (1874), and in *Wilson v. Bogle*, 95 Tenn. 290, 49 Am. St. Rep. 929 (1895),



to the effect that the owner of mining rights can never force a partition in kind as to land on which mines have been opened. Opened or developed mining lands are of two classes: of the first class are those in which the extent, location, and value of the mineral deposits can be definitely ascertained. In the case of placer mines and of coal seams whose extent is known, the court will decree a partition in kind even though mines have been opened. *Manley v. Boone*, 159 Fed. 633 (1908); *Royston v. Miller*, 76 Fed. 50 (1896). On the other hand, lode and quartz mines being of indefinite extent are not fairly partible, and partition can be made only by a sale and division of the proceeds. *Paul v. Cragnaz*, 25 Nev. 293, 47 L. R. A. 540 (1900). It would seem that the latter rule should be applicable to oil and gas rights because of the uneven distribution and conjectural value of these minerals.

A. M. V.

**PLEADING—THEORY OF ACTION—SURPLUSAGE.**—Plaintiff constructed a "pick-up station" on his land for the collection of waste oil draining both from wells on said land and from wells on adjacent premises. Defendant, who owned an oil lease on part of plaintiff's land, claimed that it had a superior right to all waste oil draining upon and across it. Defendant destroyed plaintiff's pick-up station and appropriated some of the oil already collected by the plaintiff. The case was submitted to the jury on special issues. The jury found that 5400 bbls. of oil already stored by the plaintiff had been appropriated by the defendant, and that 22,500 bbls. of oil would and could have been taken by the plaintiff had it not been for the wrongful destruction of plaintiff's "pick-up station." Defendant on appeal contended that plaintiff's right of action was based on conversion of the oil by defendant, and as 22,500 bbls. of the oil was abandoned property never reduced to plaintiff's possession, the recovery was not warranted. *Held*, the pleadings were sufficient to warrant recovery for the value of the 22,500 bbls. of oil. *Humphries Oil Co. v. Liles*, 277 S. W. 100 (Tex. Comm. App., 1925).

The Commission of Appeals in sustaining such recovery did not place its decision on the ground that defendant was guilty of converting the oil, but on the ground that plaintiff had pleaded a right of action for the wrongful destruction of a going business. The petition itself would indicate that the pleader was basing his action on conversion and the briefs before the Courts of Civil Appeal and Commission of Appeals confirm such theory. The court, in order to affirm the case, found a cause of action expressed in the petition which the pleader himself seemingly did not know was there. Such liberal attitude on the part of the courts is to be commended. The facts of the case were apparently fully developed on the trial and the mistaken theory of the case clearly had not prejudiced the defendant. In fact, the pleading really supported two theories. The court was warranted in considering the theory of conversion as surplusage.

The measure of damages allowed, that is, the value of the oil which the plaintiff could and would have taken had it not been for the wrongful acts of the defendant, was applicable to the theory of conversion, but was not appropriate to the theory on which the case was affirmed. The measure of damages for destroying a going business are the profits which would arise from such business. *G. H. & S. A. Ry. v. DeGross*, 102 Tex. 433, 118 S. W. 134 (1909); *American Construction Co. v. Caswell*, 141 S. W. 1013 (Tex. Civ. App., 1911). But no point was made of this in the trial court and no assignment presented to the appellate court.

F. T. P.

**SALES—INTENTION AS TO PASSING OF TITLE, WHEN DISCLOSED BY TERMS OF CONTRACT, GIVEN EFFECT.**—Parties to a proposed sale of personal property

executed a written contract, by which property was sold to buyer and nothing remained to be done to identify the property, seller to hold possession without cost to buyer pending future delivery. The Court of Civil Appeals held that the intention of the parties was that, since buyer reserved the right of inspection of goods on arrival, title was not to pass until after inspection. 264 S. W. 276. In reversing this decision, the Commission of Appeals held, title passed to buyer at time contract was made, and taking of shipper's order of bill of lading by seller and allowing inspection to buyer at destination did not affect the passing of title. *Farmers' Rice Milling Co. v. Standard Rice Co.*, 276 S. W. 904 (Tex. Comm. App., 1925).

The intention of the parties to a contract of sale determines the passing of title. *Woods v. Halfp*, 44 Tex. 633 (1876); *Scott & Mayhall v. Lubbock Grain & Coal Co.*, 113 Tex. 127, 252 S. W. 164 (1923). The question of intention is one of fact for the jury, and the finding of the trial court, sustained by the Court of Civil Appeals, that the intention of the parties was that the title should not pass until goods were received and inspected by buyer ordinarily should be conclusive. However, where the instrument itself manifests a clear intention that title shall pass immediately, no further evidence is necessary. *Robertson v. Hunt*, 77 Tex. 321, 14 S. W. 68 (1890).

There are three presumptions in favor of the holding that the contract evidenced intention that title should pass immediately upon approval of the contract. The subject of the sale was ascertained and nothing further remained to be done to prepare it for delivery, therefore title is presumed to pass immediately, if no expressed intention to the contrary. *Cleveland v. Williams*, 29 Tex. 204 (1867); *Owens v. Clark*, 78 Tex. 547, 15 S. W. 101 (1890). The provision in the contract that "seller to allow buyer thirty days free storage and insurance" supports the theory that the goods became the property of the buyer at once, as otherwise there would be no necessity for this permission. Even though title did not pass when the contract was entered into, the general rule is that when goods are shipped f. o. b. a certain point, the title is presumed to pass at that point. *Shaw v. Coleman et al.*, 236 S. W. 178 (Tex. Civ. App., 1922). This is true even though the right of inspection is reserved by the buyer upon arrival. *Lieb Packing Co. v. Trocke*, 136 Minn. 345, 162 N. W. 449 (1917); WILLISTON, SALES, 2d Ed., Sec. 473. It has been held that the title passed is a conditional one, subject to rescission on inspection for deficiency in quality. *Industrial Lumber Co. v. Northside Lumber & Bldg. Co.*, 254 S. W. 512 (Tex. Civ. App., 1923). However, the better view, supported by the majority holding, is that if goods do not measure up to the required standard when shipped title never passes, unless accepted by the purchaser. *Pope v. Allis*, 115 U. S. 363, 29 L. Ed. 393, 6 Sup. Ct. 88; WILLISTON, SALES, 2d Ed., Sec. 277.

Where the bill of lading is taken to the shipper's order for security only, the better view is that the risk of loss is on the buyer since the beneficial, if not the legal, title passes to the buyer. *Farmers' & Mechanics' Bank v. Logan*, 74 N. Y. 568 (1878); WILLISTON, SALES, 2d Ed., Sec. 305. The Texas cases go even farther than this and hold that legal title passes and that the seller retains only the right of possession as security until the draft is paid. *Robinson & Martin v. H. & T. C. R. R.*, 105 Tex. 185, 146 S. W. 537 (1912); *Hamilton Mill & Elevator Co. v. Rayford et al.*, 255 S. W. 1017 (Tex. Civ. App., 1923). The principal case is thus supported by ample authority.

L. F. B.

TORTS—CONTRIBUTORY NEGLIGENCE—DISCOVERED PERIL.—Plaintiff, who was driving a truck, was injured at a grade crossing by defendant's train. In a suit for damages judgment was entered for defendant upon a finding by

the jury that the defendant exercised due care after discovering the plaintiff's peril. *Held*, that a charge should have been submitted to the jury requiring a finding whether there was such negligence on the part of the defendant prior to the discovery of plaintiff's peril as rendered defendant incapable of averting the injury. *Smith v. Galveston-Houston Elec. R. R. Co.*, 277 S. W. 103 (Tex. Comm. App., 1925).

There was no evidence of negligence on the part of the plaintiff. The reasoning of the court is that in the absence of contributory negligence, the defendant, if it were negligent in running at an excessive speed, would be liable, even though it used all means consistent with its duties to avert the injury after discovering plaintiff's peril. Such reasoning is sound and in accord with previous decisions. *Houston & T. C. Ry. v. Sympkins*, 54 Tex. 615, 38 Am. Rep. 632 (1881); *Galveston City R. R. v. Hewitt*, 67 Tex. 473, 3 S. W. 705, 60 Am. Rep. 32 (1887); *Texas & Pacific Ry. v. Tucker*, 48 Tex. Civ. App. 115, 106 S. W. 764 (1908). The inference is that if the plaintiff had been contributorily negligent, defendant would not have been liable even though it might well have anticipated such a situation and nevertheless operated its train so as not to be able to prevent the injury after discovering the peril of plaintiff.

Assume that because of a dangerous crossing, the defendant is able to foresee that there may arise a situation where it will have to stop its cars suddenly in order to prevent a collision with highway travelers who may be crossing its tracks, but the defendant, instead of operating its cars carefully, is negligent and is thereby unable to avoid the injury after discovering the peril of a traveler. Should the defendant be allowed to plead contributory negligence as a defense in such a case? There is little authority on the point, but English and Canadian courts hold the defendant as the sole responsible cause of the injury in such a case. These courts really resolve the case into a simple case of negligence where the plaintiff's negligence plays no part. *British Columbia Ry. v. Loach* [1916], A. C. 719; *Brenner et al. v. Toronto R. W. Co.*, 13 Ont. Law Reports, 423 (1907); Francis H. Bohlen, *Last Clear Chance*, 66 U. OF PENN. L. REV. 73.

Such a doctrine is tenable although the defendant is held to anticipate the wrongdoing of plaintiff himself. The defendant may expect such conduct on the plaintiff's part and since such is true defendant must take it into consideration in his own operation. Plaintiff's wrongful conduct does not operate to give the defendant an "open season" for injuring him. Such anticipation of the plaintiff's conduct has been held to place a duty on a defendant not to be negligent in those cases holding railroad companies liable for negligence to mere trespassers, although the court frequently evades the issue by calling the trespasser a licensee. *St. Louis Southwestern Ry. v. Balthrop*, 167 S. W. 246 (Tex. Civ. App., 1914); *Ft. Worth & D. C. Ry. v. Longino*, 54 Tex. Civ. App. 87, 118 S. W. 198 (1909); *O'Leary v. Pittsburg & L. E. Ry.*, 248 Pa. St. Rep. 4, 93 Atl. 771 (1915); *Palmer v. Oregon Short Line R. R.*, 34 Utah 466, 98 Pac. 689, 16 AM. & ENG. ANN. CAS. 229 (1908).

E. R.

## BOOK REVIEWS

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VERNON'S ANNOTATED REVISED CIVIL STATUTES OF THE STATE OF TEXAS.  
Revision of 1925. Twenty-four Volumes, Annotated Texas Constitution,  
and Index. Kansas City, Mo. Vernon Law Book Company.

VERNON'S ANNOTATED CRIMINAL STATUTES OF THE STATE OF TEXAS. Revision  
of 1925. Six Volumes. Kansas City, Mo. Vernon Law Book Company.

A revision of a state's statutes is always received with mingled emotions of pleasure and regret. New books, new chapter and article numbers, changed positions and wording, modifications, eliminations, additions, mistakes; the whole process of determination by judicial decision must be gone through again. Perhaps no justification can ever be found for a wholesale revision of statutes done within a few short months. The costs cannot be counted. Burning down a mansion to get rid of the mice is more rational. The process of revision ought to be an everyday process. Statutory law is capable of being made relatively certain and smooth in its operation, but we could not make it more uncertain and jolting if we set about this end with premeditation. Experience teaches us nothing. Hence, hurried, destructive, costly, periodic revisions will no doubt continue to be the order of statutory house-cleaning.

The jurisdiction which has a bar large enough to make a painstaking publication of its statute attractive to private enterprise is fortunate. Since a statute book is the most used book in a lawyer's office, it should represent the maximum of conveniences which can be combined in a book. The bare statement of the text of the statute found in an official edition necessarily supplies the minimum of such conveniences. Private publication must supply the others—historical notes and references, annotations, cross-references, comprehensive classification and digests of the decisions under the several articles, and all the mechanical aids which a publisher can devise to lay open the material pertinent to the consideration of every title, chapter, article, sentence, clause, phrase, and word of the statutes, single and collectively. There is no book that so well lends itself to the publisher's craft. There is no publication of which the lawyer demands so much. There is no place for the annotated statute book-maker to stop, short of making completely available everything to be found in a particular jurisdiction which will throw light upon the meaning of a statute. Nothing can be omitted. What one searcher does not need, the other must have. No editor can select what is of importance; everything is important. His sole duty is to classify the whole material so as to make it accessible in the least possible time.

The 1925 Revision of Texas Statutes placed a heavy burden upon the publisher undertaking to subject it to such a process so as to meet the approval of Texas lawyers. Vernon Law Book Company, with the facilities furnished by the editorial staff of West Publishing Company at its command, has undertaken the task on a most comprehensive scale, and its first volumes promise a great success. Six volumes of the Civil Statutes and two volumes of the Criminal Statutes have been delivered. They indicate clearly the plan on which the work will be completed. The Civil Statutes will number twenty-four volumes together with a separate volume of the constitution of Texas completely annotated, and the Criminal Statutes will number six volumes.

The importance of this publication at this time cannot be briefly stated.



Its many points of superiority over any other publication of its nature which has yet made its appearance in Texas or perhaps elsewhere would warrant a much longer review than space permits. In every detail it surpasses the 1914 edition of Texas statutes by the same publisher. No doubt it is as near a perfect piece of craftsmanship as could be put out at this time. Each volume is a book of some five to six hundred pages, thin and light, of shelf dimensions, well bound in distinctive color. It makes a complete departure from the policy which publishers have recently followed in attempting to put a whole library between the covers of one volume. Bulkiness in a book makes it unattractive and inconvenient from every standpoint. Any inconvenience in selecting a particular volume from so large a number is counterbalanced by the ease with which it is used. The paper is good, the text of the statutes stands out in clear type running across the page, the headings of the articles are easily caught, and the notes, while in small type, are clearly printed in double columns immediately following each article. The page presents a neat and attractive appearance with no suggestion of crowding. Although there is much space required for the comprehensive notes, thus separating the articles by many pages in some instances, still the numbers and title heads carried at the top of each page make it easy to locate any article quickly.

Perhaps the most distinctive and valuable features of the publication are these:

- (1) The historical notes.
- (2) The parallel tables of statutes.
- (3) The complete annotations.
- (4) The provision made for upkeep.

The historical notes indicate the changes made in the new revision from that of 1911. These changes may be by addition, change of language, omission of parts or the omission of entire articles. They are all shown in these notes. This permits a quick comparison of the new with the old statute, an imperative process in practically every case involving a statute that may arise. Art. 1970 presents a good illustration:

All county courts at law and all similar courts by whatever name known, which now exist, shall be continued in force, together with their organization, jurisdiction, duties, powers, procedure and emoluments that now exist by law, until otherwise changed by law.

The historical note reads as follows:

This article appears to have no counterpart in Rev. Civ. St. 1911. The laws creating the various county courts at law are set forth here, following this article, numbered as articles 1970-1 to 1970-297, inclusive, with explanatory notes and notes of decisions thereunder, which see.

Following this are found fifty pages (297 articles) which relate to these courts. These articles are still in force, but were omitted from the official edition. This is just one of such instances, some of which are perhaps of far greater importance. Considering the many changes that the revisers made, such information as is given in these notes is of the greatest value. It will not only save a great deal of time, but the assurance given the user of the publication can hardly be estimated. In this connection it may also be mentioned that the Acts of the Thirty-ninth Legislature which are not included in the official edition are carried forward in their proper places. Likewise the errors in spelling and misuse of words in the original act are caught. See, for example, Arts. 493, 495, 542, 631, Penal Code, Vol. 1.

Second: In furtherance of the same general idea parallel tables connecting the 1911 and all of Vernon's Annotated Statutes, with the present revision

are to be provided. However great the change made by the revisers, the place of any article of the old statute can be instantly found in the new.

Third: The annotations to the decisions, both state and Federal, are pointed and chronologically arranged much as in the publisher's 1914 edition of VERNON'S SAYLES' TEXAS CIVIL STATUTES and Supplements. Some reach the proportions of digests and are very valuable. Now and then you wonder how the consideration of a certain topic came to be placed under a particular article, as for instance, the subject of Demurrer under Art. 2002, Bill of Discovery. Perhaps other instances can be found where the classifier's judgment could be questioned, but being largely a matter of judgment, the principal point is whether the material has been well worked out under the classification adopted, and of this there can be no doubt. The successful use of any digest or annotated statute is largely one of practice through which defects in classification disappear.

Fourth: The arrangement for supplementing each volume quarterly and annually with cumulative supplements, the latter of which will be placed in the pocket provided in the back of each volume, is of the very greatest value. The first quarterly supplement has made its appearance neatly bound in an attractive and adjustable binder. Each volume will be kept up to date in the most convenient fashion. When the annual supplements become too bulky the material will be distributed and the whole volume reprinted. This will tend to do away with the necessity for frequent revisions if not for revisions altogether. Perhaps it will suggest the idea of revising constantly instead of by wholesale. If such a result should follow this very simple device, the publishers will deserve the good will of all Texas. The promise of some such result gives further justification, if it were needed, for a large number of small volumes rather than a few bulky ones.

Another feature of importance promised by the publisher is that of a single index covering both civil and criminal statutes. A thorough index is indispensable to any book or set of books. The criminal and civil statutes covering insurance, corporations, taxes, slander and numerous other topics are very closely related and a single index will afford the greatest convenience.

At the rate the volumes are coming out it seems probable that the entire set will have been delivered before the end of the current year. It will form an indispensable part of every lawyer's library. With its completion no other jurisdiction will have its statute law made more conveniently available than Texas. The publisher is justly entitled to the good will and approbation of the profession for the high service which has been so promptly and effectively rendered.

*Leon Green.*

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## THE WORK OF THE MIXED CLAIMS COMMISSION, UNITED STATES AND GERMANY

The traditional policy of the United States of settling international controversies through the orderly processes of justice administered by arbitral tribunals is written large in all of the treaties of peace to which this country has been a party following the conclusion of the World War. The United States in 1921 negotiated three independent treaties establishing friendly relations between it and Germany and Austria and Hungary,<sup>1</sup> respectively, in each of which were reserved and preserved all of the rights stipulated for its benefit or the benefit of its nationals in the several peace treaties imposed in 1919 and 1920 by the Allied Powers associated with the United States in the war. While the right of the Government of the United States to recover on its own account large sums in the way of reimbursement for pensions and separation allowances and the like was expressly waived by it, it has nevertheless been careful to preserve and has been diligent in enforcing all of the rights stipulated in the allied peace treaties for the benefit of its nationals.

Germany, Austria, and Hungary each entered into an agreement with the United States for the adjudication of all claims which might be asserted against them by the Government of the United States or its nationals under the treaties restoring friendly relations between them. Austria and Hungary joined the United States in a tripartite agreement<sup>2</sup> under which the claims against them are being adjudicated by the "Tripartite Claims Commission," presided over by a single judge designated "Commissioner." The procedure is simple and direct but wholly judicial and is unique in arbitral history.

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<sup>1</sup>42 U. S. STAT. AT L. 1939, 1946 and 1951, and U. S. TREATY SERIES Nos. 658, 659 and 660, respectively.

<sup>2</sup>U. S. TREATY SERIES No. 730.

Under the agreement of August 10, 1922,<sup>3</sup> between the United States and Germany, the Mixed Claims Commission was constituted, composed of a commissioner from each nation and an umpire, the latter to decide all questions or cases on which the two commissioners could not agree.<sup>4</sup> It is the work of this latter Commission, now nearing its conclusion, which is the subject of the present paper. The Mixed Claims Commission, United States and Germany, as its official title reads, takes the place, so far as concerns Germany and the United States, of the Reparation Commission, the Mixed Arbitral Tribunal, the Clearing Offices, and the various arbitrators provided for in the Treaty of Versailles.

The task which confronted the Commission when it held its first session on October 9, 1922, was a more formidable one than had ever before confronted international arbitration. It was somewhat simplified, however, by the fact that liability was fixed by the treaty, and therefore international law would have to be consulted in adjudicating the claims only in aid of the interpretation of provisions of the treaty. This Commission furnishes the first instance where a treaty restoring friendly relations between belligerents prescribes what the vanquished nation shall pay for, and leaves the amount to be paid to judicial ascertainment by a tribunal in the selection of which both nations have a voice and before which both are fully heard. The Commission is guided by justice, equity, and good faith and not bound by any particular code or rules of law. But where

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<sup>3</sup>42 U. S. STAT. AT L. 2200, U. S. TREATY SERIES No. 665.

<sup>4</sup>The first Umpire of this Commission was Mr. Justice William R. Day, who soon after this appointment retired as Associate Justice of the Supreme Court of the United States. When he resigned on account of ill health in May, 1923, shortly after the Commission had begun the hearing of its first cases and only a few weeks before his death, the German Government joined the Government of the United States in selecting Edwin B. Parker as Umpire. Chandler P. Anderson, of New York, who has a long record of international arbitration, was designated as American Commissioner. Dr. Wilhelm Kiesselbach, a distinguished lawyer of Hamburg, has been German Commissioner from the outset. Each Government has an Agent, a political representative, who heads a legal and clerical staff, to prepare and present cases to the Commission for adjudication. Robert W. Bonyng, of New York, formerly a Representative in Congress from Colorado, in 1923 succeeded Robert C. Morris, also of New York, as the American Agent; and Dr. Karl von Lewinski, German Consul General at New York, is the German Agent.

The Umpire, Edwin B. Parker of the Houston (Texas) Bar, is also at present sole judge or commissioner of the Tripartite Claims Commission of the United States, Austria and Hungary and one of the three judges sitting on the General Claims Commission (see 43 U. S. STAT. AT L. 1730) to adjudicate all controversies between the United States and Mexico excepting revolutionary claims. He is also a member of the panel from which jurists for the International Central American Tribunal are selected.



the treaty does not fully prescribe the measure of damages, the Commission resorts to international conventions, general or particular, establishing rules expressly recognized by the United States and Germany, international custom as evidence of a general practice accepted as law, rules of law common to the United States and Germany established by either statutes or judicial decisions, the general principles of law recognized by civilized nations, and judicial decisions and the teachings of the most highly qualified publicists of all nations as subsidiary means for the determination of rules of law.

When the Commission held its first meeting less than one-half of the claims which subsequently proved well grounded had been filed or notice thereof given to the Department of State. The rest, including many demands for remote damages and some that were frivolous, were filed during the next six months, ending April 9, 1923, the limit fixed for the presentation of claims. When the last claim was filed there was the astounding total of 12,425 claims, many of them containing more than one item, aggregating approximately \$1,500,000,000. Germany from the outset has been exceedingly anxious to have these claims adjudicated as rapidly as accurate results would allow and has cooperated whole-heartedly with the United States to that end. In the three years which have now elapsed since the first case was docketed before the Commission the claims have been disposed of so speedily that there now remain only some 1400, most of which are debt or bond cases. The work of the Commission should be ended, the writer understands, before next October, making four years in all and setting a new record for the rapid dispatch of cases before an international arbitral tribunal.

Upon examination of the claims, it was found that they were listed under twenty-seven classifications, which embraced these ten categories:

- (1) *Lusitania* claims; death, personal injury, and property losses.
- (2) Death claims (other than *Lusitania* cases).
- (3) Personal injury claims (other than *Lusitania* cases).
- (4) Claims of prisoners of war and for arrest and imprisonment of civilians.
- (5) Damage to or destruction of property, at sea or on land, in neutral, hostile, or occupied territory.
- (6) Sequestration, requisition, and other seizures of or interference with property.
- (7) Bank deposits, bonds, and debts.

- (8) Patent infringements.
- (9) Claims for refund of amounts paid for war-risk and other insurance premiums; and
- (10) Claims for losses as a consequence of the war and other remote claims.

The Commission early adopted an efficient and economical system for their disposition under which (1) administrative decisions and opinions<sup>5</sup> were rendered in groups of test cases which would govern all claims of those classes; and (2) under the supervision of the Commission the two agents have applied the principles and rules announced in such administrative decisions to the facts of the individual claims. In most of the cases the agents have been able to join in a stipulation or agreed statement of the facts, in whole or in part, so that the labors of the commissioners and the umpire in disposing of individual cases have been considerably lightened and the work of the Commission greatly expedited.

The system of applying to groups of cases the principles and the measure of damages enunciated in test cases proved to be something revolutionary in the conduct of arbitral procedure. International arbitration had heretofore accepted the idea and adopted the practice of considering each case on its merits as it reached a place on the trial docket. It had been the accepted theory of international arbitration that each case, having been submitted, was to be fought out in court; that each case was to have its day in court. But precedent received a real jolt at the hands of the Mixed Claims Commission, and progress was the beneficiary thereof. Every circumstance lent itself to the creation of the new procedure.

The Commission was composed of men of wide experience in legal matters and to each of whom an organized system looking to the

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<sup>5</sup>The general decisions and opinions were separately printed by the Commission in pamphlet form when promulgated, the pagination being continuous, and a consolidated edition of them, together with the Opinions in Individual Lusitania Claims and other Cases, was published June 30, 1925. The general decisions and opinions rendered up to May 13, 1925, have also been printed in 18 AMERICAN JOURNAL OF INTERNATIONAL LAW 175-186, 361-373, and 580-634, and 19 *ibid.* 363-364, 593-633, and 803-823.

The work of the Commission and its opinions have been reviewed by: The Umpire in 1924 PROCEEDINGS OF THE AMERICAN SOCIETY OF INTERNATIONAL LAW 162-165; the German Agent in XI AM. BAR ASSN. JOUR. 159-163; and 20 *ibid.* 171-206; Prof. James W. Garner in 1924 BRITISH YEAR BOOK OF INTERNATIONAL LAW, 222-225 and 1925 *ibid.* 204-210; Prof. Edwin M. Borchard in 19 AMERICAN JOURNAL OF INTERNATIONAL LAW, 133-143 and 20 *ibid.* 69-80; Prof. Manley O. Hudson in X AM. BAR ASSN. JOUR. 487-489; Prof. Hessel E. Yntema in 23 COL. L. REV. 511, 24 *ibid.* 134; and Joseph Conrad Fehr in NORTH AMERICAN REVIEW, January, 1924, reprinted in CONGRESSIONAL RECORD for January 21, 1924.

prompt dispatch of business strongly appealed. The German member of the Commission, Dr. Wilhelm Kiesselbach, had served with distinction on the bench in Germany and had had ample opportunity of appreciating the necessity for dispatch in handling a crowded court calendar. The American commissioner, Hon. Chandler P. Anderson, had back of him a long and honored career in international arbitration work. He had been American agent of the Northeastern Fisheries Arbitration, American member of the United States-Norwegian Ship Arbitration, and American member of the American-British Claims Arbitration of 1910, not to mention lesser diplomatic assignments given to him by the American Government. He had seen the older and former method of long drawn out contest before arbitrations by the nations parties thereto. Hon. Edwin B. Parker, the Texan who was honored with the appointment of umpire on the Commission, brought to the tribunal a combination of rare and fortunate qualities of mind, the experience of a man who had succeeded to a superlative degree in the world of business, a genius for organization, and tremendous executive ability. It was inevitable that the test case plan, spelling expedition as it did, would appeal to the three experienced men who comprised the court and particularly to the umpire, combination as he was and is of successful lawyer and business man.

It is not surprising, then, after such a practical system had been evolved, and with each participating government animated by the sincere desire to conclude the vast work, that the two distinguished agents, Dr. Karl von Lewinski, German doctor of laws, scholar, author, and diplomat, and Hon. Robert W. Bonyngé, prominent and able New York lawyer, could and did sit down in conference and settle in an amicable manner across a table claims involving millions of dollars. The two agents having agreed, a brief statement of facts was drawn embodying the substance of the agreement, accompanied by a draft of award based on the agreement. These documents being in turn approved by the two national commissioners, the award would then be entered. No memorial, no answer, no brief, no reply brief had been necessary; just common sense and system and frankness and fairness. These were the elements, which prevailing always, have enabled the Mixed Claims Commission to dispose of claims with a dispatch and to an extent without precedent or parallel in arbitral history.

Many able and scholarly opinions were written by the two national commissioners. Frequently there was pronounced disagreement between them, however, and the case or disagreement would be cer-

tified to the umpire. Occupying a pivotal position, in which in case of disagreement by the two commissioners the decision of the umpire became the decision of the Commission, it was inevitable that vast and ultimate responsibility would fall upon the shoulders of the umpire, and that upon him would devolve the duty of delivering the opinion in many important and warmly contested cases. In a number of important cases there was a united court, as in the *Lusitania* test case, the war premiums case, the naval works and materials case, the first administrative decisions announcing general rules and conclusions, these and others. In each such instance the opinion was delivered by the umpire.

It was natural that the tribunal and all parties concerned would sincerely wish that the distressing and troublesome *Lusitania* case be disposed of as quickly as possible, and this was done. Be it said to the credit of the court and to the representatives of the two interested governments that the decision in this case was unanimous, evincing the spirit of frankness and fairness in which the case was approached and handled.

As time elapses, the decision of the tribunal in the *Lusitania* test case and in the individual *Lusitania* cases, as announced by the umpire, will be the more appreciated, for in them will be found distinct and enlightening contributions to arbitral law and guiding precedents to be consulted in adjusting international tort claims of the future.

The *Lusitania* test case served to emphasize sharply the fundamental difference between a diplomatic claim when handled between two foreign offices and that same claim after it had been passed on to an international arbitration. The decision made it quite clear that while a diplomatic claim might be punitive in its demand when being pressed by a foreign office, the claim when it came before an arbitration would be shorn and stripped of its punitive aspects and would retain only its strictly legal bases and features.

Germany had not officially disavowed the sinking of the *Lusitania*. The case, from one viewpoint, had gone before the Commission as an unadjusted diplomatic incident. In the memorial filed by the United States punitive damages in addition to actual compensatory damages were asked. This novel and troublesome question was ably, and it is believed definitely and decisively, handled in the opinion of the Commission as rendered by Parker, umpire, in the course of which he said:

The industry of counsel has failed to point us to any money award by an international arbitral tribunal where exemplary,



punitive, or vindictive damages have been assessed against one sovereign nation in favor of another presenting a claim in behalf of its nationals.

In addition to calling attention to the fact that the Treaty of Berlin did not authorize exemplary damages, the umpire pointed out significantly that the demand for punitive damages was a political act and not a justiciable question, and that in effect no nation could or would leave to an international tribunal the assessment of damages involving an alleged indignity to the national honor. The conclusion is well illustrated by the words of the umpire:

. . . how repugnant to the fundamental principles of international law is the idea that this Commission should treat as justiciable the question as to what penalty should be assessed against Germany as a punishment for its alleged wrongdoing. It is our opinion that as between sovereign nations the question of the right and power to impose penalties, unlimited in amount, is political rather than legal in its nature, and therefore not a subject within the jurisdiction of this Commission.

The *Lusitania* test case and decisions of the umpire falling thereunder were determinative of many useful questions which have been simplified for the future. In case of death at the hands of an agency for which a respondent government may be held liable at international law or by treaty, the injured one is not the decedent but the person who is dependent upon him and who can prove pecuniary loss to himself by reason of and growing out of the death. The claim of such a next of kin is an original and not a derivative one. It is not inherited from the decedent but originates in the injured next of kin. Because of this, the citizenship of the decedent becomes immaterial,<sup>6</sup> and it is sufficient that the claimant show American citizenship at the time of the loss (death) and continuously thereafter and that dependency on the decedent, absolute or limited, be proved. In establishing this dependency the amount of the support or contributions the claimant was receiving from the decedent may be shown; the age and state of health of each, occupation, habits, and other elements affecting probability may be looked to. While no compensation may be allowed ordinarily to relatives who were not dependent upon a decedent and who had received no support or contributions from him and would not have done so,<sup>7</sup> recovery was

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<sup>6</sup>So held in Baylies Case, Mixed Claims Commission, Consol. Ed. p. 554 (1925).

<sup>7</sup>So held in the Shields Case, Mixed Claims Commission, Consol. Ed. p. 412 (1924).

allowed a father for the death of a wife and two children.<sup>8</sup> Money derived from life insurance cannot be deducted from an award coming to a claimant in case of a claim based upon the killing of one upon whom the claimant had been dependent. The remarriage of the woman left a widow by the death cannot be invoked to reduce the amount of her award. The American citizenship of a claimant need only be proven according to American standards as found in American municipal law and executive pronouncement, and the *Mackenzie Case* held that an arbitration can go no further than to ascertain if American requirements in these respects have been satisfied by the claimant.

These and many other interesting and important rules were made in the *Lusitania* cases. In many of them no claim was presented for property lost, only the claim for death or personal injury being pressed. When the last *Lusitania* case pending before the Commission was disposed of last fall, some ten years after the tragedy, a total of 194 docketed cases arising out of that disaster had been decided, over three-fourths of them by the umpire after the national commissioners had formally disagreed, and the total awarded was \$2,409,413.31, exclusive of interest, of which \$2,108,050 was for loss of life and personal injuries sustained and \$301,363.31 for loss of personal property and for hospital and similar expenses.

In the war-risk insurance premium cases the rule of proximate cause was ably stated by Parker, umpire.

In the opinion in the "naval and military works or materials" cases valuable and constructive rules are laid down as to the status of ships and goods (materials) in time of war as determined by the use to which the ship was being put, its navigation and control, and the purpose for which the cargo was intended, including the ownership.

In the so-called "loss profits" decision, the umpire rendered his most conclusive and elaborate opinion, construing the various features of the Treaty of Berlin. These were the charter and fishing cases, wherein recovery was sought under the treaty for loss of charter hire or freight money under a charter party and loss of catch of fish. He held that while there could be no recovery for such lost profits under the Treaty of Berlin, as that treaty had not enlarged Germany's obligations over those imposed upon her by the Treaty of Versailles, there could be recovery for loss of tangible property, and that under certain circumstances a charterer's interest in a ship constituted tangible property. The manner in which the umpire

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<sup>8</sup>Luck Case, Mixed Claims Commission, Consol. Ed. p. 355 (1924).

worked out this involved problem is unique in the history of international arbitration, and his method is quite different from the ordinary rule of international law and of admiralty in measuring the losses of a charterer. He held in effect that the charterer's property interest in a ship was the difference between the reasonable market value of the ship if and to the extent its sale value would be reduced by the existence of an encumbering charter party.

The greatest difficulty encountered in disposing of individual claims occurred in the unliquidated damage cases, such as those for death and personal injury. In *Administrative Decision No. II* it was held that:

Claims growing out of injuries resulting in death are not asserted on behalf of the *estate* of the deceased, the award to be distributed according to the provisions of a will or any other fixed or arbitrary basis. The right to recover rests on the direct personal loss, if any, suffered by each of the claimants.

In the next opinion the Commission announced principles governing death and personal injury cases arising out of the sinking of the British steamship *Lusitania*. After pointing out that "The basis of damages is not the physical or mental suffering of deceased or his loss or the loss to his estate, but the losses resulting to claimants from his death," the Commission prescribed this rule for measuring damages:

. . . Estimate the amounts (a) which the decedent, had he not been killed, would probably have contributed to the claimant, add thereto (b) the pecuniary value to such claimant of the deceased's personal services in claimant's care, education, or supervision, and also add (c) reasonable compensation for such mental suffering or shock, if any, caused by the violent severing of family ties, as claimant may actually have sustained by reason of such death. The sum of these estimates, reduced to its present cash value, will generally represent the loss sustained by claimant.

The most scientific and accurate formula for measuring damages in death cases which this writer has seen was then laid down as follows:

In making such estimates there will be considered, among other factors, the following:

(a) The age, sex, health, condition and station in life, occupation, habits of industry and sobriety, mental and physical capacity, frugality, earning capacity and customary earnings of the deceased and the uses made of such earnings by him.

(b) The probable duration of the life of deceased but for the

fatal injury, in arriving at which standard life-expectancy tables and all other pertinent evidence offered will be considered.

(c) The reasonable probability that the earning capacity of deceased, had he lived, would either have increased or decreased.

(d) The age, sex, health, condition and station in life, and probable life expectancy of each of the claimants.

(e) The extent to which the deceased, had he lived, would have applied his income from his earnings or otherwise to his personal expenditures from which claimants would have derived no benefits.

(f) In reducing to their present cash value contributions which would probably have been made from time to time to claimants by deceased, a 5 per cent interest rate and standard present-value tables will be used.

(g) Neither the physical pain nor the mental anguish which the *deceased* may have suffered will be considered as elements of damage.

(h) The amount of insurance on the life of the deceased collected by his estate or by the claimants will not be taken into account in computing the damages which claimants may be entitled to recover.

(i) No exemplary, punitive, or vindictive damages can be assessed.

Mental suffering, the German agent contended, did not constitute a recoverable element in death cases. Conceding the difficulty of measuring such damages, the Commission said:

. . . This, however, furnishes no reason why the wrongdoer should escape repairing his wrong or why he who has suffered should not receive reparation therefor measured by rules as nearly approximating accuracy as human ingenuity can devise. To deny such reparation would be to deny the fundamental principle that there exists a remedy for the direct invasion of every right.

Mental suffering is a fact just as real as physical suffering, and susceptible of measurement by the same standards. . . . The difficulty of measuring mental suffering or loss of mental capacity is conceded, but the law does not refuse to take notice of such injury on account of the difficulty of ascertaining its degree.

Mental suffering to form a basis of recovery must be real and actual, rather than purely sentimental and vague.

The *Lusitania Opinion* decided in principle all of the death and personal injury cases, leaving the Commission to apply these principles later to the facts in each individual case in assessing damages. The Commission, therefore, fixed the date of this decision, November 1, 1923, as the date from which interest on all awards in death and



personal injury cases should run, at the rate of 5 per cent per annum, so that there would be no discrimination between claimants on account of differences in dates of awards. The awards for the personal property lost in the *Lusitania* disaster bear interest from the date of the sinking, May 7, 1915. Nearly all of the death and personal injury cases have been decided by the umpire after the national commissioners had been unable to agree. There were some very interesting results in the individual claims.

The first decided was the *Lusitania* test case,<sup>9</sup> which was brought on behalf of the minor child and the widow of Albert Lloyd Hopkins, president of the Newport News Ship Building and Dry Dock Company, a man 44 years of age with bright prospects, who, while successful in business and earning \$25,000 per annum when he died, had never saved anything out of his salary, his sole source of income, all of which he spent on his family and himself, so that he left only \$10,000 in life insurance. The widow remarried some five years after his death. Applying the rules, she received an award of \$50,000 and the daughter \$80,000. This joint award of \$130,000 is the largest growing out of a single death in the history of international arbitration.

In the second case decided, claim was made for losses suffered resulting from the death of the wife and two minor sons, the only children of the one claimant and the daughter and grandsons of the other claimant. The wife's activities had been confined to making a home for her husband and rearing and educating their children, and she had made no pecuniary contributions to anyone save small amounts toward the support of her aged mother for sums received from her husband. Pointing out that "The losses sustained by claimants are in part only susceptible of measurement by pecuniary standards," the umpire made an award of \$20,000 to the husband and \$5000 to the mother and \$3900 for the property lost.

A grandfather was denied an award because the death of his infant granddaughter, one year old, lost with her parents on the *Lusitania*, resulted in no damage to him which could be measured by pecuniary standards.

A claim was made by a young married woman for the death of her uncle and aunt, with whom she had resided after the death of her mother when she was 12 or 13 years old until her marriage in 1910, after which she lived apart from them with her husband. It appeared that the uncle and aunt had never contributed toward her

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<sup>9</sup>United States on behalf of May Hopkins Gilmer v. Germany, Mixed Claims Commission, Consol. Ed. p. 353 (1924).

support but left her all their property. She had sustained no pecuniary loss in their deaths, hence there was only the award to the estate for the value of the property lost on the *Lusitania*.

The second largest award on account of a single death was rendered in the case of a wealthy man, Albert C. Bilicke. On account of the fact that the decedent's growing wealth had been derived from his own efforts in business, in which he was still engaged when he died, and that he had been very liberal in supporting his wife and three minor children, the umpire, after taking into consideration the fact that "to the extent that such actual or probable contributions were derived as income from the estate of deceased which vested in the claimant on his death and yielded to them the same income as it yielded to him during his life, the claimants have suffered no pecuniary damages," awarded \$50,000 to the widow for her personal injuries and for damages as a result of the death of her husband, and \$30,000 each to the two sons and the daughter on account of the death of their father.

In the case of another rich man, Alfred Gwynne Vanderbilt, whose estate of over \$15,000,000 came from an inheritance from his father, no award was made to the claimants, his widow (who had remarried) and his three children. The reason for the umpire's decision was:

The producing power, if any, of the decedent is not disclosed by the record. No evidence is offered of his having had any income other than the fruits of the property disposed of by his will.

There was a similar result in the claim for the death of a wealthy widow, Amelia Macdona.

Charles Klein, the English playwright, also died in that disaster. An award of \$30,000 to his younger and \$20,000 to his elder son was made, but his widow presented no claim because she was a British subject.

For the death of Elbert Hubbard, the author, and his wife awards totaling \$57,500 were made to three of the five sons and daughters, after making allowance for benefits resulting from the descent of the estates to certain of the claimants.

No award was made for the death of Justus Miles Forman, the novelist. He left no dependents and no near relatives. The ten claimants were his heirs-at-law, a half-sister, a nephew, three nieces, two grandnephews, and three grandnieces, residing at considerable distances from him, who inherited his modest estate, but none of whom could prove that he had suffered pecuniary damage.

Let us turn now to the other general decisions governing groups of cases.

The question as to the jurisdiction of the Commission as determined by the nationality of claims resulted in opinions which covered the entire field of that phase of international law. The commissioners, having disagreed, certified the points of difference with their opinions to the umpire, who in a comprehensive opinion said:

. . . It is no doubt the general practice of nations not to espouse a private claim against another nation unless in point of origin it possesses the nationality of the claimant nation. The reason of the rule is that the nation is injured through injury to its national and it alone may demand reparation as no other nation is injured. As between nations the one inflicting the injury will ordinarily listen to the complaint only of the nation injured. A third nation is not injured through the assignment of the claim to one of its nationals or through the claimant becoming its national by naturalization. While naturalization transfers allegiance, it does not carry with it existing state obligations. Only the injured nation will be heard to assert a claim against another nation. Any other rule would open wide the door for abuses and might result in converting a strong nation into a claim agency in behalf of those who after suffering injuries should assign their claims to its nationals or avail themselves of its naturalization laws for the purpose of procuring its espousal of their claims.

After pointing out that—

even this practice of nations may be changed by mutual agreement between the two governments parties to a particular protocol creating a tribunal for the adjudication of claims and defining its jurisdiction,

Judge Parker held that the claims within the jurisdiction of the Commission are contractual obligations assumed by Germany under the Treaty of Berlin and became absolute on the date when the treaty became effective, November 11, 1921. These obligations, he said,

embrace all claims which were impressed with American nationality both on the date when the loss, damage, or injury occurred and at the time the treaty became effective and also possessed the other prerequisites to bring them within the treaty provisions. . . . The rights thus fixed constitute property the title whereof passes by succession, assignment, or other form of transfer. . . . They may be asserted against Germany by the United States and by *no other nation*, for they are contract rights, American in their origin, arising under a treaty to which Germany and the United States are the only parties.

The umpire decided that—

the devolution of claims from American nationals to aliens subsequent to the coming into effect of the treaty on November 11, 1921, cannot affect (1) the contract obligation of Germany to pay them; (2) the right of the United States at its election to demand their payment; or (3) the jurisdiction of this Commission to determine the amount of the obligation.

This rejected the rule contended for by the German agent,

that no nation will assert a claim of a private nature against another nation unless such claim possesses the nationality of the nation asserting it continuously from its origin to the time of its presentation and even of its final adjudication by the authorized tribunal,

as to which the umpire doubted "whether the alleged rule has received such universal recognition as to justify the broad statement that it is an established rule of international law."

The next general decision applied to claims of American nationals for damages growing out of the deaths of aliens. The national commissioners were unable to agree, the American commissioner holding the view that—

Germany is liable under the Treaty of Berlin for all losses, damages, or injuries, which American claimants have suffered . . . whether or not the persons lost were aliens or citizens of the United States.

In a concise but emphatic and very clear opinion the umpire here made a decided and further contribution to international law. Heretofore no nation had espoused the claim of a surviving dependent for substantial damages suffered by him where the deceased and the survivor were of different nationality, because, first, no one owing allegiance to the nation of the deceased had suffered damage; and, second, the nation to which the survivor owed allegiance was presumably not in a position to claim for the death of the deceased. As a result, survivors suffering substantial damages through wrongs inflicted by a government resulting in death have gone remediless because of the failure of the nation of their allegiance to understand the true nature of their claim. The writer ventures to predict that this decision will have the effect of reforming that situation so that justice will be done with increasing frequency. A few quotations from the opinion will suffice to show how inevitably the conclusion followed from the searching examination made of the nature and theory of such claims:

A right to recover damages resulting from death accrues when,



but not until, the death occurs. Manifestly a decedent cannot recover for his own death, nor can his estate, in a representative capacity, recover what the decedent could not have recovered had he lived. No system of jurisprudence has ever undertaken to measure by pecuniary standards the value to a man of his own life. But an enlightened public opinion, expressed in the statutes and judicial decisions of civilized nations, has recognized the right of survivors to recover pecuniary damages sustained *by them* resulting from the death of another. This is a rule declaratory of rights and corresponding liabilities and not one merely for measuring damages. It is expressly recognized by the Treaty of Versailles. . . . Germany is expressly obligated to make compensation for damages suffered by the nationals of the Allied and Associated Powers resulting from the deaths of civilians caused by acts of war.

. . . The right to such compensation does not vest in the claimant through the decedent, for such right was never lodged in the decedent. On his death the initial right to demand compensation for damages suffered vests in the survivor. The basis of the liability to respond in damages is not the loss sustained by the nation, or by the estate of the deceased, or the value to them of the life lost, but rather the damages resulting to the survivor from the death. The claim of such survivor is original and not derivative.

A claim put forward by the United States on behalf of an individual who was an American national both on May 7, 1915, the date of the destruction of the *Lusitania*, and on November 11, 1921, when the Treaty of Berlin became effective, and who has suffered damages by reason of the loss on the *Lusitania* of the life of a British subject, fully meets these tests and falls within the terms of the Treaty of Berlin. In such a case an American national has unquestionably been damaged by the act of Germany in the prosecution of the war, and such damage is clearly attributable to Germany's act as a proximate cause. The fact that the damage was inflicted through the taking of the life of a British subject is immaterial. To the extent that damages were suffered by British nationals as surviving dependents of the British subject whose life was taken, Germany is obligated under the Treaty of Versailles to compensate Great Britain. But a claim on behalf of an American national, who has been damaged through the taking of the life of the British subject, cannot be asserted against Germany by Great Britain. It is impressed with American nationality in point of origin and, when it is also American owned at the time the Treaty of Berlin became effective, it may be espoused internationally by the United States on behalf of its national and by no other nation.

. . . The rule here announced is in entire harmony with the uniform practice of this Commission in repeatedly denying to the United States the right to put forward claims on behalf

of British dependents of American nationals lost with the *Lusitania*.

The administrator of the estate of Evan Jones, for example, sought to recover not only for the death of Jones on the *Lusitania* but for the personal property lost with him. Both the decedent, who was born a Welshman, and the administrator were American citizens. An illegitimate daughter of the decedent, who was born and has ever remained a subject of Great Britain, was the lawful heir to his entire estate (being administered in Iowa), the assets of which were of a value largely in excess of all claims against it. The Commission, therefore, held that under the Treaty of Berlin there could be no recovery against Germany, as it appeared that no one who was an American national at the time of the decedent's death had suffered any damage through his death or through the loss of any personal property which may have been lost with him.

In the case of the death of a British subject, the umpire held that his widow, who was born in the United States, had resided therein her entire life, and was residing therein when her husband perished, by virtue of the statutes of the United States "*eo instanti* resumed her American citizenship upon the termination of the marital relation by his death," the precise instant of time in which the claim arose, and was, therefore, entitled to an award. The question there decided was novel both in domestic and international law.

In the claim of Maud Thompson de Gennes it appeared that her first husband, an American citizen, was lost on the *Lusitania*, and in 1917, long before the treaty was made, she married a French national and thereby lost her American nationality under the American statute then obtaining. The American commissioner was of the opinion that, a memorial having been filed with the Department of State in August, 1915,

this claim was espoused by the Government of the United States at the time that government undertook the diplomatic negotiations with the German ambassador at Washington with reference to the liability of Germany to make compensation for damages to American nationals,

and, therefore, was

a claim of American nationality, irrespective of any subsequent change in the nationality of the subordinate private interests therein.

The umpire disagreed with that view and decided that, inasmuch as there appeared to have been no such espousal of this or any other individual *Lusitania* claim until long after this claimant lost her

American nationality, "this case presents no exception to the rule" that the claimant must be an American national on the date the treaty became effective as well as at the time the claim originated.

In the *Hilson Case* the American agent presented the claim of a man who was a British national when injured in 1916, while a radio operator on the American steamship *Columbian*, and became an American citizen in 1918. He maintained that he was an American national when the claim arose because a special statute<sup>10</sup> provided that a foreign seaman in the American merchant marine who had declared his intention to become an American citizen "shall, for all purposes of protection as an American citizen, be deemed such, after the filing of his declaration of intention to become such citizen." But the umpire denied the claim because the claimant when injured did not "owe permanent allegiance to the United States," being then only a declarant, and, therefore, was not protected by the treaty.

Another interesting question of nationality arose in the *Mackenzie Case*, decided last October. This involved the doctrine of election of citizenship upon attaining majority by one who has dual nationality. There has been endless debate among international lawyers regarding the status termed "dual nationality." It is the term used to denote the practical situation of a person who is claimed by each of two countries as its citizen or who under the laws of each of two countries may have citizenship in each. The person involved in this case was born in the United States of British parents, who returned to England with him during his minority. Judge Parker held that he could—

neither divest himself of the duties and obligations of an American citizen, nor be divested of the rights of an American citizen, save through expatriation by becoming a naturalized citizen of a foreign state in conformity with its laws or possibly by taking an oath of allegiance to a foreign state,

which he never did. The umpire pointed out that the common error in assuming that one residing within the jurisdiction of his parents' country after becoming of age had thereby elected to retain the nationality of his parents and throw off the nationality of his birth was due to "confusing the permanent loss of citizenship with the loss for the time being of diplomatic protection." He held that the American State Department "does not possess and has never possessed" "the power to strip of American citizenship" an American by birth of foreign parents, although it may, so long as he resides in his parents' land, decline, in its discretion, to protect him, inter-

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<sup>10</sup>U. S. REV. STAT., Sec. 2174.

vene in his behalf, or issue to him a passport. This being so, and Congress having passed no legislation requiring that "the anomalous status of dual nationality must be terminated through election by the party possessing it" within any particular time after becoming *sui juris*, it results that an election of nationality by one residing abroad in this situation is a fact, which must be established as any other fact, care being taken not to confuse evidence of an election with the fact of election. In this case the person was held to have remained an American citizen to his death, despite his long residence in England and in Canada before returning to the United States.

In the *Harrison Case* the only one of three claimants who sustained pecuniary damages as the result of their brother's death on the *Lusitania* was the sister, a British subject. She had been continuously domiciled in the United States for more than twenty-four years, and had more than seventeen years prior to her brother's death formally declared her intention to become an American citizen, but she had never been admitted to citizenship. Yet during all those years she had never asserted any right of a British subject. In an interesting opinion, Judge Parker held that as "An expression of an intention to become a citizen does not make such declarant a citizen" she did not "owe permanent allegiance to the United States" as required by the treaty. Therefore her claim was dismissed.

Many American-owned vessels and cargoes were lost or damaged by German torpedo, mine, or gunfire. Test cases were early submitted to settle the question whether the United States could recover for the destruction of ships sunk during her belligerency while carrying supplies to Europe or returning from Europe. This required a construction of the phrase used in the clause in the treaty exempting Germany from liability for damage to or destruction of any property which constituted "naval and military works or materials." The Commission first made clear that it—

is not here concerned with the quality of the act causing the damage. The terms of the treaty fix and limit Germany's obligations to pay, and the Commission is not concerned with inquiring whether the act for which she has accepted responsibility was legal or illegal as measured by rules of international law.

It was then held that two Dutch vessels requisitioned by the United States and turned over to the United States Shipping Board, for which the United States was bound to compensate the Dutch nationals, their former owners, were property "belonging to" the United States Government when sunk, and, therefore, under the



treaty Germany was financially liable. The fundamental principle announced in this general decision was that in order for a vessel to constitute "naval and military works or materials" she "must have been operated by the United States at the time of her destruction for purposes directly in furtherance of a military operation against Germany or her allies," and that "so long as a ship is privately operated for private profit she cannot be impressed with a military character, for only the government can lawfully engage in direct warlike activities." It was ruled that a merchantman was not impressed with a military character by being armed for defensive purposes or manned by a naval gun crew or routed by the navy or protected by a convoy. As to the converse the rule was prescribed that—

When, however, a ship, either owned by or requisitioned by the United States during the period of belligerency, passed into the possession and under the operation of either the War Department or the Navy Department of the United States, thereby becoming a public ship, her master, officers, and crew all being employed and paid by and subject to the orders of the United States, it is to be presumed that such possession, control, and operation by a military arm of a government focusing all of its powers and energies on actively waging war, were directly in furtherance of a military operation. Such control and operation of a ship will be treated by the Commission as *prima facie*, but not conclusive, evidence of her military character.

Later, in the case of Christian Damson, the master of the *Joseph Cudahy*, a vessel for the sinking of which by submarine the German Government was held not financially liable under the treaty, it was decided, upon the claim being certified to the umpire, that the captain could not recover for his personal injuries because he was not a civilian and that the personal property lost by him was being used "in the navigation of the ship which he was commanding and which was engaged directly in furtherance of a military operation against Germany," and was, therefore, "impressed with the military character of the ship and of the claimant." The umpire reasoned thus:

Turning to the treaty and reading in connection with their context the words which this Commission is called upon to construe, it is obvious that the terms "civilian population" and "civilian" as used in the reparation provisions of the Treaty of Versailles were intended to describe a class of nationals common to all of the Allied and Associated Powers. The true test in determining what nationals of each power belong to this class is to be found in the object and purpose of their pursuits and activities at the time of the injury or damage complained of, rather than in the statutory label which their respective nations may have happened to attach to them. . . . The in-

equalities produced by the proposed test as between the several powers, all claiming under the same terms of the same treaty, in themselves suggest the unsoundness of the test proposed. . . . If the activities of such nationals were at the time aimed at the direct furtherance of a military operation against Germany or her allies, then they cannot be held to have been "civilians" or a part of the "civilian population" of their respective nations within the meaning of the treaty. The line of demarcation between the "civilian population" and the military within the meaning of the treaty is not an arbitrary line drawn by the statutory enactments of the nation, each nation drawing it in a different place, but a natural line determined by the occupation, at the time of the injury or damage complained of, of the individual national of each and all of the Allied and Associated Powers without reference to the particular nation to which he may have happened to belong.

The umpire finds that the claimant was an American national in the exclusive employ and pay of the Government of the United States in time of war and a part of and subject to the absolute control of a military arm of that government whose every resource and effort was directed against Germany and her allies; that he was subject to military discipline and to trial by court-martial; that under the decisions of the Judge Advocate General of the Army of the United States and of the courts of the United States he was "serving with the armies of the United States in the field"; and that he was in command of and had "full and paramount control of the navigation of the ship," which this Commission has already held was impressed with a military character *because* it was being used by the United States directly in furtherance of a military operation against Germany or her allies.

The umpire holds that the claimant at the time of the sinking of the ship of which he was master was not a "civilian" or a part of the "civilian population" of the United States as those terms are used in the Treaty of Berlin, and hence that Germany is not obligated to pay for such damages as claimant may have sustained by reason of the exposure and privation which he suffered as a result of the sinking of the *Cudahy*.

The umpire decided last May a claim for a part of the cargo lost when the American steamship *Kerwood* was sunk on December 1, 1919, more than a year after the Armistice Convention which ended hostilities, by a submarine mine in the North Sea planted by one of the belligerents and not removed. The treaty obligated Germany to make compensation for damage suffered during America's belligerency irrespective of which group of belligerents planted the mine if the sinking constituted "a damage directly in consequence of hostilities or of any operations of war." The German agent contended that as the armistice agreement of November 11, 1918, provided for

"immediate cessation of all hostilities at sea" no act occurring thereafter can be considered as an act of hostility or an operation of war. In rejecting this contention the umpire held:

. . . The mine was planted by a belligerent during the period of belligerency for the purpose of destroying shipping. Planting the mine was an act of hostility and an operation of war. At the time it was planted the mine was impressed with a hostile and belligerent character. The signing of the armistice and the change in the hostile attitude and intent of the belligerents did not change the hostile character of the mine or the nature of the cause of the damage suffered by claimants. The act of a belligerent in planting it, while remote in time from the damage which it caused, is not remote in natural and normal sequence. On the contrary, the mine effectively performed the very function it was intended to perform—the destruction of shipping—and the change in the attitude of the belligerents, as expressed in the armistice agreement, which provided for the "immediate cessation of all hostilities at sea," did not and could not operate on the mine to prevent its performing this hostile function. The damage wrought was directly attributable to the hostile act of planting the mine and was directly in consequence of hostilities within the meaning of the Treaty of Berlin.

Many cases were presented for damages which were too remote to be allowable. Over three thousand claims, involving about \$345,000,000, were made for the refund of amounts paid to insurance companies as premiums on war-risk insurance against losses which never occurred. In nearly all cases that cost had been entirely passed on to the ultimate user or consumer. The Commission, after an exhaustive argument, decided against them, refusing to hold Germany financially liable for all the consequences of the war:

. . . The sole complaint here is that the hazards of war required the claimants as a matter of business prudence to protect by insurance against risks which never matured into damage to or destruction of the property insured, and the claimants seek to recover from Germany the cost of them of such insurance. . . . Germany is financially obligated to make full and complete compensation for all losses sustained by American nationals proximately caused by Germany's acts. But under the terms of that treaty Germany cannot be held liable for all losses incident to the very existence of a state of war. To this class belong claims by American nationals for refund of premiums paid by them for insurance against the risks of possible losses which never occurred, risks in their very nature uncertain, indefinite, indeterminable, and too remote to furnish a solid basis on which to rest a claim.

The same principle governed the disposition of the life insurance



claims. Certain American life insurance companies sought to recover from Germany alleged losses resulting from their being required to make payments under policies insuring lives of civilians for whose deaths Germany was liable. The case was thoroughly argued and the nature and theory of life insurance exhaustively developed. The umpire dismissed the claims because—

. . . Although the act of Germany was the immediate cause of maturing the contracts of insurance by which the insurers were bound, *this effect* so produced was a circumstance incidental to, but not flowing from, such act as the normal consequence thereof, and was, therefore, in legal contemplation remote—not in time—but in natural and normal sequence. The payments made by the insurers to other American nationals, beneficiaries under such policies, were based on, required, and caused, not by Germany, but by their contract obligations. To these contracts Germany was not a party, of them she had no notice, and with them she was in nowise connected. . . . In striking down the natural man, Germany is not in legal contemplation held to have struck every artificial contract obligation, of which she had no notice, directly or remotely connected with that man. The accelerated maturity of the insurance contracts was not a natural and normal consequence of Germany's act in taking the lives, and hence not attributable to that act as a proximate cause.

Some claims were presented based upon losses suffered by claimants who were parties to a contract breached through the death of the other party resulting from injuries due to Germany's act. The umpire decided that there could be no recovery in such cases. This question was presented, for instance, in the Hickson claims.<sup>11</sup> The claimant's two sisters, who he alleged were in his employ under life contracts, were lost on the *Lusitania*. In dismissing these claims the umpire said:

. . . Claimant's counsel earnestly contends that where one without sufficient justification interferes with a contract sanctioned by law to the injury of a party to it, the wrongdoer must respond in damages to the injured party. In support of this proposition are cited numerous authorities, in each of which it was made to appear that the third party inflicting the injury upon one of the parties to the contract did so with full knowledge of the contract and with the *intention* of interfering with it. The authorities cited in nowise conflict with the rule here announced. But the great diligence of claimant's counsel has pointed this Commission to no case, and it is safe to assert that none can be found, where any tribunal has awarded damages to

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<sup>11</sup>See also the Saladin Pneumatic Malting Construction Company Case, Mixed Claims Commission, Consol. Ed. p. 457, 460 (1924).



one party to a contract claiming a loss as a result of the killing of the second party to such contract by a third party not privy to the contract without any *intention* of disturbing or destroying such contractual relations. The American courts, including the Supreme Court of the United States, have uniformly rejected such claims. The United States cannot now be heard to assert them against Germany. Certainly there is nothing in the Treaty of Berlin or in the records of these cases or of any of the cases before this Commission to indicate that claims of this class could have been within the contemplation of those who negotiated, drafted, and executed that treaty.

A reading of the opinions of the Commission will disclose the most painstaking and close analysis of the facts as a basis for the application of the principles announced and the assessing of damages in each case.<sup>12</sup> This is particularly true in connection with those cases in which an attempt had been made to procure an improper award or greatly exaggerate the amount of damages suffered.<sup>13</sup> The attitude of the Commission with respect to fraud is thus expressed by the umpire:<sup>14</sup>

Claims before this Commission are asserted not by individuals but by the Government of the United States, on its own behalf or on behalf of its nationals, against the Government of Germany. The latter has a right to assume that no claim will be put forward that does not bear the impress of good faith and fair dealing on the part of the claimant. In the protection of the national honor the United States will refuse actively to espouse claims of its nationals who have failed frankly and fully to lay before it all of the facts in connection therewith. It is, however, the general practice of the American agent to submit to the Commission for its consideration and decision, particularly in claims growing out of the sinking of the *Lusitania*, all cases prepared by claimants and their private counsel falling within its jurisdiction, and such submission does not imply that in the opinion of the American agent the particular claim is worthy of espousal by the Government of the United States. When, as in this instance, a claim unworthy of espousal by the United States in the form presented comes before this Commission it will not hesitate to dismiss it. The umpire holds that the claimants herein have failed to discharge the burden resting upon them to prove their case.

The umpire is authorized to say that while, with numerous other claims growing out of the sinking of the *Lusitania*, this case has been certified to the umpire for decision, both national

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<sup>12</sup>For example, the Pearson Case, p. 572.

<sup>13</sup>Among them the Smith Case, page 465, Candlish Case, 544, Witherbee Case, 591, and the Friedman Case, 607.

<sup>14</sup>Friedman Case, note 13, *supra*.

commissioners agree that no other disposition could properly be made of it.

The most thorough analysis of the Treaty of Berlin (and incidentally of such provisions of the Treaty of Versailles as are embodied therein) which has come to the notice of the writer is found in the umpire's *Administrative Decision No. VII* of May 25, 1925. A group of cases, arising principally out of the claims of charterers for damages suffered by them resulting from the destruction or damage of vessels under contract to them and the claims by Gloucester (Mass.) fishermen and others for the loss of earnings and probable catch of fish, resulted in such radical differences of opinions between the national commissioners that their very broad certificate of disagreement necessitated the construction by the umpire of nearly all of the provisions of the Treaty of Berlin pertaining to pecuniary claims.

In a masterly opinion, clothed in simple language, the umpire reviewed the history and terms of the pre-armistice negotiations, in which the Allied and Associated Powers notified Germany that there must be "compensation . . . made by Germany for all damage done to the civilian population of the Allies and their property by the aggression of Germany by land, by sea, and from the air," and the Armistice Convention of November 11, 1918, in which it was provided that Germany shall make "reparation for damage done." Judge Parker then discussed such provisions of the Treaty of Versailles as had been incorporated by reference into the Treaty of Berlin in order to preserve the advantages reserved to the United States by the Knox-Porter resolution approved July 2, 1921,<sup>15</sup> the pertinent portions of which were also made a part of the Treaty of Berlin. That treaty preserved "all the rights and advantages stipulated for the benefit of the United States in the Treaty of Versailles which the United States shall fully enjoy notwithstanding the fact that such treaty has not been ratified by the United States." The Knox-Porter resolution was enacted for the purpose of declaring the war at an end, after the United States had refused to ratify the Treaty of Versailles, and the umpire ruled that "the United States held a position as one of the principal victorious powers which the Congress was careful to preserve" but that the Congress did not intend "to lay upon Germany a heavier burden than that laid upon her by the Treaty of Versailles," and that, therefore, the Treaty of Berlin, negotiated immediately afterward, did not "place upon Germany a burden with respect to the damage or injury to the persons

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<sup>15</sup>42 U. S. STAT. AT L. 105.

or property of American nationals heavier than that placed upon her by the Treaty of Versailles." He declared:

In the resolution declaring the war at an end, the Congress of the United States clearly manifested a purpose to demand that American nationals should in all things be placed on a parity with the nationals of the Allied Powers, not only with respect to all claims arising during the period of American belligerency but also with respect to all damage caused during the period of American neutrality, by the acts of Germany. The position of the United States as one of the principal victorious participants in the war—a position which the Congress was careful to proclaim in Section 2 of the resolution, and a position which America has at every step carefully preserved—entitled it to make this demand.

Judge Parker pointed out that the treaty provides what Germany shall pay for, that the Mixed Claims Commission was erected to determine judicially *how much* Germany shall pay, and that the questions of *how* payment of awards shall be made or secured and *when* such payment shall be made are political questions which still remain to be settled by the two governments. He held that the provision of the resolution dealing with the claims of American nationals "for loss, damage, or injury to their persons or property, directly or indirectly," did not enlarge Germany's obligations under the Treaty of Versailles but protected all American claims, however remote, provided always that "the proximate cause of the loss must have been in legal contemplation the act of Germany."

In other words, the indirectness of loss by American nationals . . . refers to the nationality of the corporate or other entity or to the property in which they may have been interested rather than to the absence or remoteness of any causal connection between Germany's conduct and the particular loss complained of.

The corporation if American-owned could recover, or the American stockholder of an American or a foreign corporation could recover as such. The Commission had previously held in *Administrative Decision No. III*—

that in all claims based on property taken and not returned to the private owner the measure of damages which will ordinarily be applied is the reasonable market value of the property as of the time and place of taking in the condition in which it then was, if it had such market value; if not, then the intrinsic value of the property as of such time and place,

with interest in either event at 5 per cent per annum to the date of payment from the appropriate date (ordinarily the date of loss

if occurring during American neutrality or at any time in German territory, and the date of the armistice of November 11, 1918, if occurring during American belligerency). Judge Parker showed that the Commission had consistently applied those provisions to property destroyed and under them the amount of Germany's liability for the material or physical damage of tangible property of every nature has been determined and that—

. . . Under them damages for the destruction of American ships ("Hulls"—cargoes being separately dealt with) have been measured. Under them damage to the plants and tangible properties of Belgian subsidiaries of American corporations has been assessed as damage done to the property of American nationals and awards have been made to the United States on their behalf. . . . In computing the reasonable market value of plants and other properties at the time of their destruction, the nature and value of the business done, their earning capacity based on previous operations, urgency of demand and readiness to produce to meet such demand which may conceivably force the then market value above reproduction costs, even the good will of the business, and many other factors, have been taken into account. But this is quite a different thing from assessing damage for loss of prospective earnings or profits for a period of years computed arbitrarily or according to the earnings of competitors whose properties were not destroyed, and the awards made by this Commission do not embrace the items claimed of prospective earnings or prospective profits.

The main point of the decision was thus expressed:

The umpire decides that, save in certain excepted cases, Germany is not obligated under the Treaty of Berlin to make compensation for loss by American nationals (1) of prospective personal earnings as such; or (2) of prospective profits as such growing out of the destruction of property, but holds that the earning power and the then value of the use of the property destroyed may be taken into account with numerous other factors in determining the reasonable market value of such property at the time and place of destruction, which value, with interest thereon as heretofore prescribed by this Commission, is the measure of Germany's liability. The umpire further decides that, save in certain excepted cases, the provisions of the Treaty of Berlin dealing with damage to property are limited to physical or material damage to tangible things. But two or more different estates or interests in a tangible thing may exist at the same time, the sum of which equals a full, complete, absolute, unconditional, and unencumbered ownership of the whole, and it is important to avoid confusing the nature of the damage to tangible things, with the nature of the estate or interest in those tangible things damaged or destroyed. Under the treaty



a thing can have but one value, but several estates or interests may inhere in it.

As to the charterers' claims this principle resulted in the following conclusion :

As applied to the loss of tonnage the tangible things destroyed are ships. The value of their use at the time and under the conditions then existing has been taken into account by this Commission as a factor in determining the market value of tonnage lost. Where, under the terms of a then existing charter-party, the charterer was at the time of the loss entitled to the use of the ship on terms which would have had the effect of reducing the price which the owner could have obtained for it *if sold burdened with the charter*, then at the time of the loss the charterer had a pecuniary interest in that particular ship, *a jus in re*, a property interest or property right the subject matter of which was the ship, an interest entering into and inhering in the ship itself. Such a right and interest is an encumbrance on the ship in the sense of constituting a limitation on the owner's right to possess, control, and use it and as affecting the price at which it could be disposed of in the market burdened with the charter. It is an interest in the subject matter which the municipal courts will protect against both the owner and those claiming under him with notice thereof. In cases where such interest existed at the time of the loss the measure of damages remains unchanged but the market value of the whole ship must be apportioned between the owner and the charterer in proportion to their respective interests therein; and the United States is entitled to an award on behalf of (a) the owner, if an American national at the requisite dates, in an amount equal to the price for which the ship could have been sold on the market at the time of loss *burdened with the charter*, with 5 per cent interest thereon from November 11, 1918, or from the date of loss if destroyed at a later date; and (b) the charterer, if an American national at the requisite dates, in an amount equal to the difference if any between the said award on behalf of the owner and the reasonable market value of a free ship not burdened with the charter, with interest on the amount of this difference at the same rate and from the date. This does not change the rule that so far as Germany is concerned her obligation is limited to making compensation for the tangible property destroyed—the ship—and that such compensation is measured by the reasonable market value of the ship at the time and place of its destruction plus interest thereon computed in accordance with the rules announced in Administrative Decision No. III. This rule for the apportionment of damages will be applied by this Commission in a case where an American-owned ship has been chartered to an alien on terms which operated to reduce its market value encumbered with the charter, and the owner's damage will be assessed at the reasonable mar-

ket value of the ship *so encumbered*, with interest thereon. Conversely, in a case where the owner is not an American national, Germany will nevertheless be held obligated to make compensation to an American charterer to the extent of the difference if any between the reasonable market value of the ship free of the charter and the reasonable market value of that ship encumbered with the charter, with interest on the amount of this difference.

If the owner of an encumbered ship were awarded its entire unencumbered market value, then the owner who had made an improvident charter would profit by the destruction of his vessel. And if in addition thereto the charterer should, as contended by American counsel, be awarded an amount equal to the net value of the use of the ship during the full term of the charter, then Germany's aggregate obligations would be in excess of the aggregate of the reasonable market values of all interests in the whole ship.

The umpire then held that Germany is obligated under the treaty to pay claims for the reasonable market value of all tangible property lost in the sinking of vessels but is not obligated thereunder to pay claims for lost wages or lost profits or lost earnings in such cases or for fish that would probably have been caught if the ship had not been sunk. However, in respect to property situated in German territory, he added, the treaty established a different rule; if such property was interfered with by exceptional war measures, imposed by Germany in her own territory, where she was, of course, acting advisedly and with full knowledge of the probable results, then lost profits and lost earnings would be recoverable, such a claim coming under the economic instead of the reparation provisions of the treaty.

In the underwriter cases, involving losses of American insurers (including the Government of the United States) of hulls and cargoes damaged or destroyed through submarine warfare, and in the so-called estate cases and the claims for debts and bank deposits, the German agent practically conceded the correctness of the viewpoint of the American Government without contesting them; and these groups, with the exception of the underwriter cases, were never litigated before the Commission and the claims in those classes have been and are being settled by agreement between the two agents on terms approved by the Commission.

In the underwriter or insurance cases the international law viewpoint was practically conceded, to the effect that the insurer, from the moment the insurance was written, acquired an inchoate interest in the property insured, this interest becoming absolute and dating back to the time of loss, upon payment of indemnity by the insurer. By far the largest underwriter claim was that preferred by the Gov-

ernment of the United States on behalf of the Bureau of War Risk Insurance, later known as United States Veterans' Bureau. The award on behalf of the United States Veterans' Bureau with the interest thereon amounts now to over \$32,000,000. Adding the other awards to the United States, including Shipping Board losses, brings the government awards up to a total of over \$57,000,000, including interest to date.

Hull valuations, including both insured and uninsured vessels, in line with the admirable policy of the two governments, were adjusted through conference and without litigation, much time being saved in this way.

In the debt, bank deposit, and bond cases a compromise rate of 16 cents to the mark was arrived at. This further time-saving achievement was also attained by conference between the representatives of the two governments. In the bond cases Germany agreed to become liable for losses occurring in Germany in cases where the claimant could show that the proximate cause of his loss was the operation of a German exceptional war measure. American bank deposits in Germany were treated as debts, as were interest coupons collected by Germany from American-owned bonds which were in Germany during the war. The stipulations covering Germany's liability in the debt, bank deposit, and bond cases were formally entered on the minutes of the Commission.

The end being in sight, the final total of awards may be roughly forecast when one knows what has taken place to January 1, 1926, which is as follows:

| In favor of—          | No. of cases. | Amount of awards exclusive of interest. | Amount of awards including interest to January 1, 1926. |
|-----------------------|---------------|-----------------------------------------|---------------------------------------------------------|
| United States Govern- |               |                                         |                                                         |
| ment as such.....     | 66            | \$ 42,034,794.41                        | \$ 57,097,256.05                                        |
| Private claimants ... | 2240          | 84,331,432.92                           | 111,972,536.59                                          |
| <hr/>                 |               |                                         |                                                         |
| Total .....           | 2306          | \$126,366,227.33                        | \$169,069,792.64                                        |

There were on January 1, 1926, 260 docketed cases pending before the Commission and some 1400 claims pending in the American agency to be prepared and docketed. All the rest have been disposed of through dismissal by the Commission, withdrawal by the claimant, or return to the Department of State by the American agent for various reasons.

When an arbitration succeeds as fully and signally as has the instant Commission, it cannot fail to constitute an example to be followed by nations and to encourage the creation of other similar

commissions. The practice of international law has without doubt been tremendously stimulated by the World War and its aftermaths, and the new developments in world commerce and banking raise problems daily which can be settled only on the basis of international law. As Mr. Kellogg, Secretary of State, said last spring:<sup>16</sup>

We all remember only a few years ago when an international lawyer was merely a sort of an ornament of society. He had no practical use in our jurisprudence or in our public life. Today, the international lawyer is quite a figure in practical legal life. . . . The best international lawyer is also a good lawyer and should be in general practice. That makes him a better international lawyer. . . . As arbitrations increase, questions between nations which must be settled by lawyers, by arbitration or by judicial procedure, increase, and the demand for men trained in this branch of the law will become greater.

*Marshall Morgan.*

Washington, D. C.

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<sup>16</sup>1925 Proceedings of the American Society of International Law 140.



## THE PROBLEM OF JURISDICTION

### 1. JUDICIAL POWER

At the threshold of the problem of jurisdiction lies the question of judicial power. It is a distinctly American difficulty, adopted as a piece of political theory from that popular French philosophy of government which was current when our first constitutions were being framed. There were conceived to be three departments of government—executive, legislative, and judicial—and all governmental acts were supposed to be subject to classification on that basis. The judicial department was to exercise the whole judicial power of the State, performing all judicial acts, and was to refrain from exercising any powers of an executive or legislative character. It was an interesting philosophical analysis of the theory of State action, but as a practical guide for operating the State it was very troublesome. Experience soon showed that a division of public functions strictly in accordance with that theory was impossible, for transactions which required to be carried through under unified direction and responsibility were frequently made up of elements falling under more than one of these separate classes. But every governmental activity had to be labelled and assigned somewhere, and it fell to the courts, of course, to make the final decision.

There were two ways of looking at these problems of classification of functions. One was by subjecting them to a philosophical analysis, the other was by viewing them as problems in operating efficiency. The results of the two methods differed. Under the first there was no certain test to be applied, for the outcome depended upon the emphasis which was to be placed upon one factor or another. The decision was likely to go either way, with no regard for the consequences, for logic is a blind guide through the mazes of social phenomena. The second method drew directly upon the lessons of experience, determining in advance what result would be the most useful, and consciously seeking to reach it. Probably no court ever consistently employed either method to the exclusion of the other. Sometimes one and sometimes the other has been in favor, resulting in the most amazing incongruities.

For example, in *Locke v. Speed*,<sup>1</sup> the court held that a statute which required the circuit court to audit and allow the fees of coroners before they were paid by the county, did not violate the constitutional prohibition against imposing non-judicial duties

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<sup>1</sup>62 Mich. 408, 28 N. W. 917 (1886).

upon courts. The practice, said the court, had been followed for years without being questioned, showing a long acquiescence by the people and the courts, and it was too late to raise the point. Now, of course, acquiescence in an unconstitutional statute could not make it constitutional, but the real argument was that the auditing had to be done by somebody, that the plan of audit by the circuit court had worked satisfactorily, and that a practicable and successful scheme for doing a necessary task ought not to be upset on account of theoretical considerations relative to the nature of judicial functions. Since the circuit court appeared well qualified to do the work, that work would be deemed judicial.

On the other hand, the same court in *People v. Dickerson*,<sup>2</sup> held a statute unconstitutional which authorized the judge, in any criminal case requiring expert testimony, to himself appoint disinterested experts to investigate and testify, on the ground that to select a witness was not a judicial act. In this case no weight was given to the practical need for obtaining impartial experts in order to avoid the scandalous use of hired partisans. That the circuit judge could do better than anyone else what imperatively needed doing, was held in no way to justify the statute. Under a theoretical analysis of the meaning of the term, the calling of a witness was found not to be a judicial act, and the decision rested there.

Comparing the two cases, if the same test had been applied, the same result might have been reached in each. If those acts were to be deemed judicial which could conveniently and usefully be done by courts under our scheme of government, both statutes possibly, but certainly the one relative to expert witnesses, would have been held valid. If, on the other hand, usefulness and effectiveness in the administration of justice were to be deemed immaterial considerations, and the sole test of a judicial act were to be found in the abstract definition of the term, then neither statute would have been sustained.

In *Borgnis v. The Falk Co.*,<sup>3</sup> the court held that the Workmen's Compensation Act did not delegate judicial functions to an administrative board. Why? Because "it was admitted by lawyers as well as laymen that the personal injury action brought by the employee against his employer to recover damages for injuries sustained by reason of the negligence of the employer had wholly failed to meet or remedy a great economic and social problem which modern industrialism has forced upon us. . . . The terrible economic

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<sup>2</sup>164 Mich. 148, 129 N. W. 199 (1910).

<sup>3</sup>147 Wis. 327, 133 N. W. 209 (1911).

waste, the overwhelming temptation to the commission of perjury, and the relatively small proportion of the sums recoverable which comes to the injured parties in such actions, condemn them as wholly inadequate to meet the difficulty." In other words, as soon as the functions always heretofore performed by courts cease to be well performed by them, and the interests of society will apparently be benefited by putting them in the hands of an administrative board, such functions may be considered to have become administrative. The court did not say this in so many words, but such I take to be the underlying argument.

The same question was decided exactly the other way in *Western Metal Supply Co. v. Pillsbury*,<sup>4</sup> because it was not necessary to hold the function to be administrative in order to get the desired result. The California Constitution created an exception to the separation of power doctrine in the case of industrial accident litigation, and that whole class of cases could be turned over to an administrative board as judicial business. If it had been necessary to call the function administrative in order to get the benefit of a better procedure, the court would apparently have been willing to do it, but if the better procedure was available without attaching a new label they preferred to let the old label stand.

The western states, with irrigation problems to solve, saw the necessity of a conclusive determination of the validity of irrigation bond issues in advance of the sale of the bonds, in order to create a good market for them. They authorized the courts to make these determinations, as the best agencies for the purpose, and held that the proceedings were judicial, notwithstanding there could be no present controversy over a merely proposed issue of unexecuted bonds. It was a service that needed to be performed, and the courts were well adapted to do it. That was a sufficient test of its judicial character. But the Supreme Court of the United States, not being moved by the practical necessities of the case, but looking upon the matter as a theoretical question of definition, took the view that such a case presented only a moot question, which was not judicial.<sup>5</sup>

So with appeals by the state in criminal cases after a verdict of not guilty. If judicial power is the power to hear and determine controversies, it can be very logically urged that there is no controversy before the appellate court, because the case as a criminal prosecution has absolutely terminated. But if judicial power is the power

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<sup>4</sup>172 Cal. 407, 156 Pac. 491 (1916).

<sup>5</sup>*Tregea v. Modesto Irrigation District*, 164 U. S. 179, 41 L. Ed. 395, 17 Sup. Ct. 52 (1896).

to do those things which courts are peculiarly fitted to do and which need to be done in the interest of the due administration of justice, then the hearing of an appeal by the state which involves merely an abstract question of law is an exercise of judicial power.

The Supreme Court of Michigan examined the declaratory judgment statute of that state by the test of logical analysis, quoting definitions of judicial power from many cases and finding in these definitions the basis for its decision that declaring the rights of parties is not a judicial function.<sup>6</sup> The courts of Connecticut, Kansas, California, and Pennsylvania, examining their declaratory judgment acts in the light of their usefulness to the people, and noting the convenience with which the courts could render that exceedingly valuable service, held that declaring the rights of parties was a judicial function.<sup>7</sup>

The truth is that the jurisdiction of courts under the common law has always developed according to an opportunist policy based on the needs of the time. Courts have always been able to appreciate practical operative problems and to work them out satisfactorily in the long run. But they have never been accustomed or qualified to take up philosophical speculations as a guide to judicial administration. Our constitution seemed to force them into the field of abstract political philosophy, and so far as they surrendered to that apparent compulsion they lost their way and threw the administration of justice into confusion. Only when they abandon philosophy and substitute practice, examining the machinery of the court to see what it is fitted to do, will they find sure footing. The life of the law has not been logic but experience. Would it be unreasonable to suggest that many acts are inherently neither administrative nor judicial, but may be either, depending on how and by whom they are done. We often allow different courts a limited concurrent jurisdiction, even courts as different as those of law and equity. Why not allow the administrative and judicial departments at least a limited common field, where either may be employed, at the choice of the legislature, in accordance with the facilities it has for adequately disposing of the business?

## 2. THE EXISTENCE OF A COURT

Granting the existence of judicial power, there must be an organized agency for using it, and such an agency is a court. It is

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<sup>6</sup>Anway v. Grand Rapids Ry., 211 Mich. 592, 179 N. W. 350 (1920).

<sup>7</sup>Braman v. Babcock, 98 Conn. 549, 120 Atl. 150 (1923); State v. Grove, 109 Kan. 619, 201 Pac. 82 (1921); Blakeslee v. Wilson, 190 Cal. 479, 213 Pac. 495 (1923); Petition of Kariher, 131 Atl. 265 (Pa. 1925).



necessarily a creature of the state, supported by the power of the state, because it requires the actual or potential use of force in hearing controversies between reluctant parties and providing remedies which are frequently distasteful to the losing party.

Salmond<sup>8</sup> points out that war and the administration of justice, however diverse in appearance, are really two species of a single genus, the essential purpose of each being the same, though they employ different methods. Each consists of the exercise of the organized force of the community in maintaining the rights of the community and its members. War is usually the external, while the administration of justice is the internal, manifestation of the power of the state; and the force employed in war is always actually exercised while that employed in the administration of justice is usually latent and concealed. The army is the first resort in war and the last resort in executing the judgments of courts, but a state which could call to its aid no military force would eventually become unable to administer its own laws. "The sword of justice," observes Herbert Spencer, "is a phrase sufficiently indicating the truth that action against the public enemy and action against the private enemy are in the last resort the same."<sup>9</sup>

Inasmuch as the power of the state, when directed against private parties, is quite irresistible, it is of supreme importance that it should not be employed without authority. That authority we call jurisdiction. It is conferred only upon courts.

#### (a) *De Facto Courts*

It would seem to be an elementary proposition that a legally constituted court should be indispensable for the exercise of judicial power. And the authorities generally hold that there cannot be a *de facto* judge unless there is a *de jure* court. But the legal creation of courts is not always a simple process, in view of our vague and far-reaching constitutional limitations, and of the many legislative conditions attached to their organization. After a court has apparently been properly created and has been regularly functioning it is discovered that the law which authorized it was invalid or that there was a failure to take the proper steps to give it legal existence. Should all of its acts be held void for want of jurisdiction?

Some courts, in passing upon this question, have taken a social rather than a legalistic view of the problem, and have undertaken

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<sup>8</sup>SALMOND, JURISPRUDENCE, Ch. V.

<sup>9</sup>2 SPENCER'S SOCIOLOGY, p. 493.

to solve it as a practical question of social economics. Thus, in a leading case on the subject the Supreme Court of Minnesota said:

The *de facto* doctrine was introduced into the law as a matter of policy and necessity, to protect the interests of the public and individuals where those interests were involved in the official acts of persons exercising the duties of an office without being lawful officers. . . . The reasons that justify the doctrine apply with equal force to a court or office where the same may be said to exist under color of right; that is, under color of law. . . . The people shall not be made to suffer because misled by the apparent legality of such institutions.<sup>10</sup>

The administration of justice should be free from traps, and technical obstacles ought not to be thrown in the path of those who in good faith rely upon the judicial machinery which they find in operation. It may be illogical to speak of a *de facto* office, but it may be practically unjust to refuse to recognize it. There is no risk whatever of a dangerous usurpation of power, for the legal existence of the office is open to question at any moment. And it would probably be difficult to find a single instance, among all the cases where the legal existence of a court was successfully challenged, where actual prejudice to anybody would have resulted from the circumstance of its illegality.

#### (b) *Division of Jurisdiction Among Different Courts*

But an aspect of jurisdiction of much more practical importance than want of a legally constituted court, is the system by which we apportion judicial powers among various separate courts and classify the controversies which are to go to each.

If the courts all draw their vitality from a common source, the state itself, it is difficult to see why they should not be considered as mere divisions of a single judicial agency, instead of separate and independent representatives of the sovereign power.

The practical inconveniences of separate courts are often very serious. If two courts are given power over two different classes of cases, and a case properly belonging to one court gets into the other and results in a judgment, that judgment would be utterly void, because it is an adjudication beyond the power of the court which renders it. The parties suppose they are in the right court, the judge also believes he has jurisdiction. Our statutes relating to the jurisdiction of courts are frequently vague and uncertain, and in spite of the greatest caution the best lawyers sometimes make

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<sup>10</sup>Burt v. Winona, Etc., Ry., 31 Minn. 472, 18 N. W. 285, 289 (1884).

mistakes. If instead of distinct courts, acting under separate grants of power from the state, there were several divisions of the same court, created as a mere procedural device for the more convenient dispatch of business, the validity of the judgment would not be affected by the accidental error of bringing the action in the wrong division.

Cases ought never to fail at any stage by reason of jurisdictional errors, if there is power anywhere to deal with them. They should simply be transferred into the proper tribunal when the error is discovered with no loss as to any proceedings already had. If the mistake is not discovered before judgment, that judgment should be just as valid for all purposes as though it had been rendered by the proper division of the court. In other words, statutory provisions, as to the distribution of business should be made directory only, and never mandatory. There will be safeguards enough against confusion of the legislative plan for doing judicial business, because either party can raise the point at will and the judges would be expected to allow no general break-down of the scheme of distribution. Such a rule for saving jurisdiction would prevent many accidental miscarriages of justice and reduce the risks which now make litigation one of the most hazardous of occupations.

England took hold of this problem half a century ago. The first provision of the English Judicature Act of 1873 was to unite and consolidate seven separate superior courts into one supreme court of Judicature,<sup>11</sup> and the next was to make the trial court and the court of appeal merely two permanent divisions of one supreme court, so that the court of appeal could, in the furtherance of justice, be given authority by rule of court to do any of the things which a trial court could do.<sup>12</sup> And the trial court division was subsequently subdivided into three subordinate divisions, King's Bench, Chancery, and Probate, Divorce and Admiralty, for the more convenient dispatch of business. The statute then proceeded to declare that any cause or matter might at any time and at any stage, with or without application of any party, be transferred from one division to any other division, or might be retained by any division in which it happened to be, although that should not be the proper division in which it ought in the first instance to have been assigned.<sup>13</sup> To save any possible jurisdictional question as to the validity of proceedings had before transfer from an improper division, the Judicature

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<sup>11</sup>Sec. 3.

<sup>12</sup>Sec. 4.

<sup>13</sup>Sec. 36.

Act of 1875 provided that all steps and proceedings whatsoever taken by the plaintiff or petitioner or by any other party to the cause, and all orders made therein before transfer, should be valid and effectual to all intents and purposes in the same manner as though taken or made in the proper division of the court.<sup>14</sup> Whenever an action of any kind is commenced in the high court, the plaintiff simply marks his summons with the name of the division to which he wishes the case to be assigned, and the only result of an erroneous assignment is a subsequent transfer to another division.

England has not developed its entire judicial system in accordance with this simple principle of unified jurisdiction. Below the high court is the county court, which exercises power over a large field of lesser civil cases, and the high court and county court are not mere divisions of a single judicial agency, but distinct courts. However, the evils of jurisdictional diversity are to a considerable extent eliminated by a provision that many classes of cases commenced in one court, which should have been brought in the other, shall, as soon as that fact is ascertained, be transferred to the proper court and proceeded with as though they had been originally begun there.<sup>15</sup> But other cases improperly begun in the county court merely die for want of jurisdiction as with us.

In the United States we have made a perceptible beginning in freeing ourselves from the tradition that getting into the wrong court is a monstrous sort of error which ruins the case beyond redemption, and that nothing remains but to hold the entire proceeding null and void from the beginning. Thus in New Jersey an act was passed in 1912 prohibiting the dismissal of any action pending in any of the four superior courts, on the ground of want of jurisdiction over the subject matter, but requiring instead that the cause should be transferred, together with the record and files, to the proper court to be proceeded with as though originally begun there.<sup>16</sup> And two years later an amendment provided that on any appeal taken in a cause that had not been transferred, the judgment should not be affected thereby, but the appellate court should decide the appeal and direct the appropriate decree or judgment to be entered by the court to which it should have been transferred.<sup>17</sup> In Michigan such a transfer is authorized between the law and chancery

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<sup>14</sup>Sec. 11 (2).

<sup>15</sup>COUNTY COURTS ACTS of 1888 and 1903, Sec. 65, 66, 68, 69; JUDICATURE ACT of 1873, Sec. 90.

<sup>16</sup>N. J. Laws 1912, Ch. 233; COMP. STAT. OF N. J., SUPP., PRACTICE, Sec. 337.

<sup>17</sup>Laws 1915, Ch. 13.



divisions of the circuit court.<sup>18</sup> But most of our states have done nothing to ameliorate the absurd and frightful consequences flowing from a want of jurisdiction over the subject matter. The concept of jurisdiction has assumed an almost superstitious significance, and want of jurisdiction has become a judicial taboo. There must be no trifling with its sinister power. Good faith, diligence, economic advantage, social benefit, convenience,—all these count for nothing in the face of its devastating logic. An act done without jurisdiction is no act at all, an absolute nullity. Orders made without jurisdiction are merely blank paper. They cannot be vitalized by any subsequent act, for you cannot make something out of nothing. The vocabulary of negation has been exhausted in describing proceedings in excess of jurisdiction.

The real difficulty is that want of jurisdiction in any case has been treated as though it were due to the fault of the litigating parties. They were presumed to know the law and they failed to observe its rules. Therefore they should take the consequences, and if the penalty is severe it will perhaps teach them to be more circumspect next time. But one who looks more deeply might well inquire whether the real fault is not with the state, which forces the litigant to face a jurisdictional dilemma which never ought to exist. The courts are established to render service, but every obstacle which is placed in the path of those who wish to use them diminishes their value to the public which supports them.

The unnecessary burden which our rules regarding jurisdiction force upon the unfortunate litigant, is still further increased by the doctrine that once having gone into a court of justice on a claim which does not conform to its jurisdictional restrictions, the plaintiff, after discovering the mistake, cannot stay in court even if he is willing to reduce his demand so as to make it a proper one for that court to adjudicate. The case has been irrevocably ruined by the original error, and no amendment can save it,<sup>19</sup> although if the original claim was a proper one for the court to pass upon, an amendment enlarging it might easily destroy jurisdiction.<sup>20</sup>

All of these jurisdictional difficulties are so easily avoidable that no reasonable excuse can be offered for their existence. There should be a single unified court in the state, organized in three divisions: the county court division for small causes, the district court division

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<sup>18</sup>MICH. COMP. LAWS, 1915, Sec. 12351.

<sup>19</sup>*Pecos & North Texas Ry. v. Canyon Coal Co.*, 102 Tex. 478, 119 S. W. 294 (1909).

<sup>20</sup>*L. Grief & Bro. v. Texas Cent. Ry.*, 163 S. W. 345 (Tex. Civ. App., 1914).

for other causes, and the supreme court division for appeals. Any administrative arrangement which would meet local conditions could be employed for the geographical distribution of the facilities of the court, and for the use of specialized judges to hear particular classes of cases. But with such a court the suitor would not be obliged to gamble on his choice of a tribunal, and the terrible burden of the jurisdictional objection would disappear. A postoffice department organized into a half dozen separate forwarding agencies, with intricate regulations as to the character of the mail which each would carry, and an absolute rule of practice that any mail deposited in the wrong office should be forfeited and destroyed, would be no greater anomaly than the present American system of regulating the jurisdiction of courts.

(c) *Time and Place of Holding Court*

Another restriction placed upon the power of a court to act relates to the time and place of its sitting. Viewed as administrative arrangements to facilitate the doing of judicial business, they are of merely incidental importance. The only purpose of a fixed time or of a fixed place is to avoid inconvenience to the parties and the court, and if no actual prejudice results from a change in either one the proceedings should not be affected thereby. As a matter of fact the whole arrangement for terms of court is a traditional formality and an artificial interference with the proper conduct of judicial business. Courts ought to be always open legally, and there should be no unnecessary obstacles thrown in the way of the prompt disposal of cases. To waste time in merely waiting for a term to open, is an inconceivable anomaly in the twentieth century, and the doctrine that judicial proceedings regularly had out of term time, with the full consent of the parties and of the court, are null and void, is only a survival of that superstitious regard for form and ceremony which always played so large a part in early law. Yet we still make conformity to a clumsy and purely mechanical scheme of administration a test of judicial power. The statement made in *CORPUS JURIS*<sup>21</sup> that "a term held at any time other than that fixed therefor is illegal and the proceedings had thereat are void," is supported by cases cited from twenty-eight states and the federal courts. Conformably with this rule, if the judge fails to appear on the day fixed for the commencement of the term, the entire term is lost, for the court cannot be convened on a later day of the term.<sup>22</sup>

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<sup>21</sup>15 C. J. 878.

<sup>22</sup>In re Terrill, 52 Kan. 29, 34 Pac. 457 (1893).

Even at a time when the technicalities of procedure had reached their climax in England, almost a hundred years ago, the courts could not subscribe to so unreasonable a doctrine. In *King v. The Justices*,<sup>23</sup> an order was attacked on the ground that "the quarter sessions at which it was made were not legally holden, and that, therefore, the acts done at those sessions were void." The court said that statutes fixing the times for holding court had always been held directory only, quoting Lord Hale as having said long ago, "that the quarter sessions are held variously in several counties, some at one day and some at another, yet it hath been ruled that these are each of them good quarter sessions, . . . for the Acts . . . are only directive and in the affirmative." The order was, therefore, held to be valid.

American statutes are similarly drawn in the affirmative only, and yet they are held mandatory. The fundamental difficulty is one which variously affects our whole procedural system, namely, the failure to construe rules of practice with sufficient elasticity to make them serve rather than hinder the efficient administration of justice.

### 3. JURISDICTION OVER THE PERSON AND THE THING

When we pass from jurisdiction over the subject matter to jurisdiction over the person or the thing, we enter an entirely different field of inquiry. Jurisdiction over the subject matter is governed by purely formal, arbitrary and mechanical rules, with no underlying principle of social importance except that of public convenience. The traffic problem in a large city, involving a classification of streets into through streets, stop streets, streets for one way traffic, streets with no left turns, etc., is an identically similar problem. No one has an inherent right to use any particular street in any particular way, and the only test of good traffic administration is the ease with which traffic moves. So with jurisdiction over the subject matter. It is merely a problem of regulating the traffic of litigation through the courts, and whatever causes accidents, congestion, uncertainty, and delay is bad for that reason alone, and whatever facilities litigation and removes unnecessary obstacles to the convenient decision of cases on the merits, is thereby sufficiently justified.

But jurisdiction over the person or the thing involves considerations of a wholly different character. Fundamental notions of fairness and justice enter into the problem with controlling force, and we find ourselves dealing with the concept of due process of law. We are so familiar with arguments over the naming of our consti-

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<sup>23</sup> 7 B. & C. 6 (1827).

tutional guarantees of due process, that we are perhaps inclined to think that the idea is peculiarly an American development. But such is not the case. The constitution gives no concrete definitions of due process, and we interpret it to mean what our sense of justice requires. In the long run this feature of the constitution probably adds nothing of a substantial nature to the security of individuals, but it does shift the discussion from the legislatures to the courts. What would otherwise be a legislative problem becomes a subject for judicial decision, but while legislatures and courts may temporarily differ over details in their interpretations of the general conscience, they both represent the same society and must justify their decisions on the same ultimate principles of justice.

Now the first requisite for the just assertion of judicial power over an individual or his property is notice and an opportunity to be heard. It was quaintly remarked by Fortesque, J., two hundred years ago, in *King v. University of Cambridge*,<sup>24</sup> that

The laws of God and man both give the party an opportunity to make his defense, if he has any. I remember to have heard it observed by a very learned man upon such an occasion, that even God Himself did not pass sentence upon Adam before he was called upon to make his defense. "Adam," says God, "where art thou? Hast thou not eaten of the tree whereof I commanded thee that thou shouldst not eat?" And the same question was put to Eve also.

How should one be notified so that he will have a fair opportunity to be heard?

The simplest case is where he is personally present within the territorial jurisdiction of the court, and is personally notified of the suit against him. This has always been considered sufficient to give him a fair opportunity to be heard in his defense.

The next step would be represented by a case where the defendant was a resident of the state but was temporarily absent. Could a notice be sent after him into a foreign jurisdiction to compel him to return to the state of his residence to answer a complaint in court?

It is quite clear that such a notice would offer the defendant a reasonable and fair opportunity to be heard. As a resident of the state he could not properly claim that it was unjust to ask him to return to his own home in order to permit the courts of his own state to pass upon his case. The Texas statute authorizing exactly this procedure was sustained in *Becker v. Becker*.<sup>25</sup>

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<sup>24</sup>1 Strange 557, 567 (1723).

<sup>25</sup>218 S. W. 542 (Tex. Civ. App. 1920).



Is there any other tie, besides that of residence, which is proper to employ as a fair basis for requiring him to come from a foreign land to defend himself in a judicial proceeding? —

It would at once occur to one that there is another tie which might be deemed sufficient, and that is the ownership of property. Where one's treasure is, there will his heart be also. By his interest in the foreign property which he owns, he has so far become voluntarily involved in the administration of the foreign laws which give that property value and security, that he may be justly required to respond to those laws by appearing in the courts which administer them.

If the views of Justice Hunt in *Pennoyer v. Neff*<sup>26</sup> had prevailed with the majority of the court, the ownership of property within the State by a non-resident would have been sufficient to entitle the court of that state to send its summons abroad against the owner. But the majority of the Supreme Court in that case were of the opinion that ownership of property alone was insufficient to warrant an assertion of jurisdiction over the defendant in foreign service of process, and that only after the property had been seized by the court on attachment or brought directly under its control by reason of a lien established on it or by an application for a determination of title, could the defendant be considered under any obligation to come under the jurisdiction to protect his rights. And this is probably the general view adhered to in the English speaking world.

But there are other possible affiliating circumstances, better calculated to connect the defendant with the local courts, so as to remove the charge of unfairness in the demand that he shall appear therein and defend. England and her dominions have developed a well defined system of service out of the jurisdiction based on the existence of such facts.

Under Order XI, Rule 1, of the present English practice, it is competent for an English court to order service of summons out of the jurisdiction whenever the action is one based upon a breach of a contract which was (1) made within the jurisdiction; or (2) made by an agent trading or residing within the jurisdiction on behalf of a foreign principal; or (3) by its terms to be governed by English law; or (4) broken within the jurisdiction, without regard to where it was made. Such an order for service outside the jurisdiction may also be made when the plaintiff seeks an injunction against acts to be done within the jurisdiction, or when any person outside the jurisdiction is a necessary or proper party to an action brought against someone served within the jurisdiction.

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<sup>26</sup>95 U. S. 714, 24 L. Ed. 565 (1877).

It will be noted that the English courts are asserting no general right to compel parties to travel from distant lands to appear in defense of actions brought in England. If foreign parties keep clear of English entanglements, and do not bring themselves into English transactions, they will be entirely free of any obligation to appear in English courts. But the English theory of due process apparently considers it fair and reasonable to hold that people who have voluntarily become parties to dealings in England must stay by those dealings until they are wound up, where necessary, by English court action. If they did not want to become subject to call into an English court they should have refrained from entering into such business transactions, just as we say that if a foreign defendant does not wish to be subject to the jurisdiction of one of our state courts, he should not establish his residence there, or if a foreign corporation does not want to be sued in a state court, it should refrain from doing business in that state.

This theory of jurisdiction over foreigners who become involved in domestic transactions is almost universal among European nations. In Belgium, service on a foreigner outside the state is good in cases where the cause of action arises in Belgium, or where necessary parties are partly within and partly without the jurisdiction. In France, service on foreigners outside the state is good in cases brought to enforce the execution of engagements made in France, or outside of France with a Frenchman. In Germany, service may be made on foreigners abroad in actions on contracts to be performed in Germany or for torts committed there. In Italy, such service is good in actions on contracts made or to be performed within the kingdom. In Norway, foreign service is allowed on causes of action arising in Norway.<sup>27</sup>

In the United States, however, the possibility of the use of foreign service of process in accordance with the almost universal practice of other nations, has been destroyed by the case of *Pennoyer v. Neff*.<sup>28</sup> It was there laid down as a rule by invariable application, that no involuntary personal jurisdiction over a non-resident could be obtained without personal service within the state where the suit was commenced. This doctrine places Americans at a distinct disadvantage as compared with foreigners. A Canadian can sue an American for breach of a contract to be performed in Canada, by service of a Canadian writ in the United States, and the judgment so obtained will be a valid judgment in Canada; whereas, an Amer-

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<sup>27</sup>*Cf.* PIGGOTT, FOREIGN JUDGMENTS, Ch. XIII.

<sup>28</sup>Note 26, *supra*.

ican cannot enjoy the reciprocal privilege, and will be denied the right to sue a Canadian for breach of a contract to be performed in the United States and to obtain a judgment good in the United States.

Prior to *Pennoyer v. Neff* a number of state courts had observed, in regard to personal judgments based on service outside the state upon non-residents, that such judgments had no binding force outside the state which rendered them. The implication that they were effective inside the state was expressly denied by the court in *Pennoyer v. Neff*,<sup>29</sup> and they were held to be "*contrary to the first principles of justice*," and, therefore, void everywhere. But can a practice which all other nations approve and follow be so easily condemned as contrary to the first principles of justice? Our concepts of justice were inherited from England, and yet neither England nor the British dominions show an unwillingness to recognize judgments which are deemed good only locally as well as judgments which are good universally.

It is perfectly logical to recognize two kinds of personal judgments: (1) those based on full jurisdiction over the person, which are good everywhere; (2) those based on a qualified jurisdiction over the person, which are good only where rendered. Such qualified judgments are somewhat similar to judgments rendered in attachment proceedings, which are good only against the property seized. Justice Hunt argued in *Pennoyer v. Neff* that it was a mere matter of municipal regulation whether property should be required to be seized before suit, on a writ of attachment, or after suit, on a writ of execution, and that there was no fundamental principle involved. In any case, service on a non-resident outside the state would make the judgment good only against property which might be found within the control of the court, and from the point of view of the principles of justice it is hard to see what difference it makes to a defendant whether his property is taken first or last, if his liability is to be limited to that property. The two kinds of judgments would offer no difficulties under the full faith and credit clause of the Federal Constitution, for if the limited judgments were rendered solely with a view to being executed against property within the state, full faith and credit could not be denied by a refusal to enforce them against the person or against property in other states.

The character of the notice by which we give the defendant his opportunity to be heard varies according to whether the proceeding is *in personam* or *in rem*. The traditional method of service at

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<sup>29</sup>At page 732.

common law was personal, and in personal actions we have retained that requirement with only slight changes.

Now, since the whole purpose of the notice is to convey information, no merely formal objection of any kind should be tenable, and the substantial and only question in any case should be whether the purpose was sufficiently well served.

But traditions die hard in the law, and the most inconsequential technicalities are constantly held to render the notice insufficient to give the court jurisdiction. For example, the style of a writ is a formal phrase indicating the authority under which it issues. It serves about the same purpose as a lawyer's letterhead. And yet this ornamental embellishment is not only required by many state constitutions, but its omission or defective form has been held by many courts to render the notice absolutely void, and by others to render it voidable. It should be no more necessary for the validity of a summons than the phrase, "Know all men by these presents" for the validity of a deed, or the phrase, "In the name of God, Amen" for the validity of a will. The seal which is so commonly required to be impressed upon the notice is such a pure formality that some courts, like the Supreme Court of Georgia, in *Lowe v. Morris*,<sup>30</sup> have treated it as utterly worthless for any purpose; and yet other courts, like the Supreme Court of the United States, in *Insurance Co. v. Halloch*,<sup>31</sup> have viewed it as so vitally essential to the validity of a summons that the lack of it will render the entire proceedings absolutely void on a collateral attack.

The law reports are filled with cases in which every conceivable defect in the notice has been urged against its validity,—that it was not signed properly or attested correctly, that it was undated or bore a wrong or defective date, that it contained no return day, that it was returnable on a day not authorized by law, that it was directed to an officer disqualified from serving it, that it contained matter unauthorized by law, that it bore teste on Sunday, that it was altered after being filled out for another action,—not one of which has any bearing upon its sufficiency as a notice. And not only have writs been quashed upon every one of these grounds, but judgments rendered upon such writs have been held void.

The same tendency to the over-emphasis of formal regularity is found in the rules regarding service of the notice. It ought to be a matter of indifference how a notice arrives, if the fact of its delivery is the substantial end to be accomplished. It might be a

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<sup>30</sup>13 Ga. 147 (1853).

<sup>31</sup>6 Wall 556, 18 L. Ed. 948 (1867).



good policy to provide that only responsible persons should be employed to do important work, like serving court notices, but the direct way to secure that desirable result would be to penalize the person who assumed to act without legal authority, not to permit the defendant to have a perfectly good notice set aside because served by an unauthorized person.

The true purpose of process and service has been lost sight of by the courts which have applied these technical tests, and legislatures have found it necessary to remind the judiciary that too close an adherence to logical distinctions was destroying the usefulness of the procedural machinery. Such a statute as that in Indiana, providing that

no summons, or the service thereof, shall be set aside or be adjudged insufficient where there is sufficient substance about either to inform the party on whom it may be served, that there is an action against him in court, the name of the plaintiff and the court, and the time when he is required to appear,

places the matter squarely on a practical operative basis. But even so plain a command as this is not proof against the refinements of legal reason when the court is not guided by a determination to make the machinery of justice run with a minimum of procedural friction. Under this Indiana statute, making the actual giving of notice the sole test of legal service, it was still possible for the court to say that the statute was not intended to declare a service good if made by an unauthorized server.<sup>32</sup>

In all of these cases which involve personal service of the kind known to the common law, the difficulty is only one of judicial standards. Shall the rules be accorded intrinsic value, because inherited as a part of the common law or because declared by statute, or shall they be recognized as controlling only for the specific purpose of accomplishing substantially beneficial results to society. As the profession becomes more and more impressed with the social burden growing out of procedural technicalities, its attitude will shift, and the methods for obtaining jurisdiction over the person of a defendant will be tested by the principles of due process of law, rather than by the rules of the game. The problem is really a simple one, with no necessarily conflicting elements.

When, however, we pass from personal service to the statutory forms of substituted and constructive service upon absent parties, we are at once faced with a much more serious situation. The substantial tests have been abandoned by the legislature, and the for-

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<sup>32</sup>Kyle v. Kyle, 55 Ind. 387 (1876).

mal makeshifts which have taken their place present a very embarrassing problem to the courts. In jurisdictional controversies the defendant, who is sought to be dragged involuntarily into court, has always been given special protection. The burden of the proceeding is considered to rest on the party who starts it, and unless that burden is satisfactorily carried the proceeding should fail. If this is true in case of defendants personally summoned by actual notice, how much more carefully must the absent defendant be protected against unfair practices where he is or may be actually ignorant of any action having been brought against him. But how can he be protected? The statute has prescribed a method of service, by publication or by posting, or by leaving at his home or office. Some device for obtaining jurisdiction over absent and even unknown defendants is necessary if the courts are to function, and these American statutes, providing for various forms of substituted or constructive service, have universally been upheld as securing to the defendant due process of law. What test can be applied to determine validity in concrete cases? Obviously no test but conformity to the statute. The defendant is not actually notified at all, and every test based on actual notice fails. It is an *ex parte* proceeding entirely, and nothing but the regularity of the steps taken by the plaintiff can be looked at. The highest degree of protection can be given to the defendant only by exacting the highest degree of technical regularity on the part of the plaintiff. In other words, the defendant is protected by making it as difficult as possible for the plaintiff to institute his suit, for every action which fails renders it less likely that some innocent defendant has been made a victim.

Now this is really an extraordinary situation. The legislature provides a mechanism to which the courts give their formal approval, but so little are they satisfied with the real fairness of the method that they deliberately obstruct its operation by the most technical refinements of construction. They give the conventional explanation that the proceeding is in derogation of the common law, and hence must be strictly construed, but this is rather an excuse than a reason, for in those states which have by statute expressly abolished the rule of strict construction of proceedings in derogation of the common law, we find exactly the same attitude toward these provisions for substituted or constructive service.

Thus, the Iowa code has for seventy-five years expressly declared that the rule of strict construction shall have no application to any provision thereof, but that the entire code shall be liberally con-

strued with a view to assist the parties in obtaining justice.<sup>33</sup> But the court nevertheless considers the provisions respecting substituted service as mandatory, and expressly declares that they are to be "strictly construed," notwithstanding the contrary command of the legislature.<sup>34</sup>

The result is to make jurisdiction depend upon the literal compliance with minute legislative directions that are intrinsically of no more value as a means of giving the defendant an opportunity to be heard than the incantations of an Indian medicine man. Such was the case in *Harness v. Cravens*,<sup>35</sup> where the plaintiff actually took double the precautions called for by the statute, but because of a technical and wholly inconsequential irregularity in the wording of the order, the judgment was held void. To put the courts in a position where they feel obliged to make these absurdly technical decisions, is to discredit them as agencies for the administration of justice. The fault is probably with the legislatures in throwing overboard the fundamental principle of justice which calls for actual notice, if possible, and a real opportunity to defend. The state may declare in its statutes that this duty to give notice terminates at the state line, but the instinct of fairness which is happily a part of human nature, denies that assertion, and the courts sustain that denial. No one should be deemed to be outside the pale of justice because he resides in another state, and as long as states remain at peace it is perfectly possible to carry an actual notice across their frontiers. Why, then, should publication or any other non-personal notice, no matter how elaborately and meticulously it is carried out, be substituted for a perfectly feasible personal service?

England has in this matter, as in some others, shown a better instinct for judicial administration than the United States. No general authority is given for any sort of substituted or constructive service, but the court will make an order for such form of service as appears best calculated to reach the defendant when a proper showing is made. In order to get an order for substituted service on a resident, a server must make three calls at the defendant's residence, on three different days at reasonable hours, and on each call he must state his business. The second and third must be made by appointment, such appointment having been made at a previous call or by letter addressed to the defendant, and at such time as will apparently give the defendant an opportunity to meet it. At

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<sup>33</sup>IOWA CODE 1924, Sec. 64.

<sup>34</sup>*Bradley Mfg. Co. v. Burrhus*, 135 Iowa 324, 112 N. W. 765 (1907).

<sup>35</sup>126 Mo. 233, 28 S. W. 971 (1894).

each call the process server must inquire as to the present whereabouts of the defendant and where he is likely to be found and when he is likely to return. At the first or second call he must leave a copy of the writ or he must inclose it in one of his letters. All the facts and the information obtained at the various calls must be stated in an affidavit setting forth the grounds for the application for substituted service, and the order will be framed in accordance with the showing, and will usually provide for service by mail at the place where defendant is most likely to be. Publication will be ordered only when there is good reason to believe that it will come to the defendant's attention.<sup>36</sup> If the defendant is a non-resident the plaintiff must get an order for personal service outside the jurisdiction, on a showing as to where he is to be found, and such service will ordinarily be made through the Secretary of State for Foreign Affairs, who will transmit the notice through the diplomatic channels to the state where the defendant is found with a request for personal service upon him.<sup>37</sup> If the whereabouts of the defendant outside the jurisdiction are not known, an order may be had for substituted service outside the jurisdiction, provided "the method of substituted service asked for by the plaintiff is one which in all probability, if not certainty, will be effective to bring knowledge of the writ . . . to the defendant."<sup>38</sup> The primary consideration is always how the matter can best be brought to the defendant's personal attention.<sup>39</sup>

In this way England retains the fundamental concept of notice as a basis for jurisdiction, whether the case affects the person or the property of the defendant, and her courts are not forced to throw technical obstacles in the way of administering her laws. With our constitutional rights of free passage from one state to another in this country, actual personal service in other states would be far easier to carry out than the sort of foreign service that the English law requires. Our system of substitution and publication is unfair, impracticable and uncalled for, and discredits our administration of justice. It is based on no rational theory, subjects property to hazards that are entirely needless, introduces technical defenses to judgments and undermines the security of titles obtained on judicial sales. Nothing would be a greater boon to the people of this country than a simple and effective procedure for giving actual

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<sup>36</sup>Order X, and notes in the *ANNUAL PRACTICE*.

<sup>37</sup>Order XI, and notes in the *ANNUAL PRACTICE*.

<sup>38</sup>*Porter v. Frendenberg* [1915], 1 K. B. 857, 889.

<sup>39</sup>Order X, and notes in the *ANNUAL PRACTICE*.



notice and an opportunity to be heard to defendants whose person or property is sought to be subjected to the jurisdiction of our courts.

The foregoing considerations relative to the problem of jurisdiction may perhaps be summarized in a word. The underlying principle is not a theoretical demand of legal philosophy, but a purely practical rule for the administration of justice. Two tests will suffice for every case, convenience and fairness. The problem of jurisdiction is only one aspect of the problem of speedy justice.

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## COMMERCIAL ARBITRATION IN TEXAS

The reputation of Texans as litigious is deserved. A comparison of the published reports as being issued of Texas appellate decisions with those of any other jurisdiction amply confirms it. A tabulation of the civil judicial statistics of England and Wales for 1923<sup>1</sup> shows, if we disregard the civil cases disposed of in the county courts of which 94 per cent involved claims of less than twenty pounds, that only four thousand six hundred and six cases were disposed of in the year. There were more civil cases filed in the district courts of a single Texas county in that year.<sup>2</sup> From the viewpoint of the bulk of litigation alone, it is imperative that the efficiency of English court procedure be adapted to our Texas practice, as nearly and as promptly as may be. The recent lectures and the articles on English court procedure in the *TEXAS LAW REVIEW* by Professor Sunderland have been most timely.

The cry is heard at every hand for the reduction of the number and size of current appellate decisions, for a more speedy determination of cases pending in our trial and appellate courts and for relief from the mounting costs, burdens and hazards of trials, appeals and new trials and new appeals. The bar may well arouse itself as evidences increase of a growing distrust by the laity of the complexities and delays of the law and even of the courts and the profession.

But needed as are reforms of procedure and substantive law, it would seem equally as important that steps be taken to reduce the bulk of Texas civil litigation to correspond more nearly to the English proportion. This perhaps cannot wholly be accomplished because of popular psychological differences, but by encouragement of arbitration and conciliation now, a start in the right direction may be made, foundations may be laid for a growth of the practice of settling differences out of court, and, as the practice grows, the remaining ills of procedural law will become less acute.

It would seem that Texas, more than any other jurisdiction, should profit from a study of commercial arbitration, as developed in England and as recently adopted in the practice of several of our American states.

In his introduction to his authoritative report on "Commercial Arbitration in England,"<sup>3</sup> Mr. Samuel Rosenbaum tersely pictured the English situation:

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<sup>1</sup>9 JOURNAL AMERICAN JUDICATURE SOCIETY 183.

<sup>2</sup>4,623, according to the records of the district clerk of Dallas County.

<sup>3</sup>Bulletin 12, AMERICAN JUDICATURE SOCIETY, October, 1916.

But the reason for the comparative rarity of English commercial trials goes deeper than that (expeditious procedure in cases without meritorious defense). Efficient though the English courts are in disposing of all but three per cent of their large volume of business without letting it come to trial, there is a large mass of disputes in mercantile and other matters that is never brought into the duly constituted courts of law at all. These disputes, instead of forming the basis of lawsuits, are, for a variety of causes and in a variety of modes, submitted to arbitration, and there has grown up in England a law, practice and custom of arbitration which is daily growing in bulk and authority and may almost be said to amount to a system of jurisprudence in itself.

It is not within the purpose of this article to survey the growth of arbitration in England or its present state of development there, other than to observe that the growth and development have resulted from statutes rather than a functioning of the common law. For at common law an agreement to arbitrate was no different in legal effect from any other agreement. A party at any time, even after submission, might revoke the arbitrator's authority and render further proceedings ineffective, or could at any time, in violation of his agreement, institute and prosecute litigation upon the same subject matter. In any such event the only remedy for the party aggrieved was an action for damages caused by breach of the agreement and ordinarily such damages were nominal. The courts would not enforce specifically an agreement to arbitrate. If, however, a submission proceeded to an award, the award generally was recognized as binding on the parties, though enforcement of the award, if not voluntarily complied with, was to be had only by filing suit on it as an established debt and obtaining a judgment of court. Under these handicaps, arbitration did not flourish in England, and, in so far as I am aware, has not flourished in any common law jurisdiction without the intervention of legislation.

For example, in our chief commercial state, the Chamber of Commerce of the State of New York adopted in 1911, after years of effort in trying to popularize arbitration, a report calling for further legislation, and as the chief obstacles to success, referring to the privilege of any party to withdraw even after arbitration had commenced and before the award had been made, and to the fact that no method existed for enforcing the award as such.<sup>4</sup> As recently said by Mr. Justice Stone, in discussing the New York law at this time:

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<sup>4</sup>COMMERCIAL ARBITRATION, 1924, by Committee of Chamber of Commerce of N. Y., 5.

That two merchants of full age and mental competency should not be permitted by the laws of their country to stipulate for the adjustment and settlement of controversies between them exclusively by the arbitration of a fellow merchant, would seem incredible to a layman. It would seem incredible to most lawyers did we not actually know that such at one time was the law of England and that until the recent adoption of the arbitration statute in New York it was the law of our greatest commercial state, as well as that of most of the states of the Union.

Agitation for legislation starting about 1910, centering in the New York Chamber of Commerce and then spreading to other organizations and other states, was aided largely by the investigation and report of Mr. Rosenbaum made under the auspices of Chicago civic organizations. Illinois adopted a statute incorporating many of the English features in 1918, and this statute has been copied with or without amendments in several western states.

In 1920, the New York arbitration law was passed, differing from the Illinois statute chiefly in that agreements to submit future disputes to arbitration were made specifically enforceable by the New York statute.

Since the passage of this New York act agitation for legislation of the Illinois type or the New York type has developed in most of the States. Rival committees of the American Bar Association have urged legislation, one upon Congress a law of the New York type, the other upon state legislatures, a uniform state law of the Illinois type. Discussion of the relative merits of the two types of statute has grown warm in many instances, as for example, in the open discussion at the last meeting of the American Bar Association at Detroit.<sup>5</sup>

Without discussing the relative merits of one statute or the other, it seems sufficient for the present purpose to emphasize the need for a statute in Texas going at least as far as the Illinois type of statute. Our present statute is inadequate. The need for relief to our congestion of litigation, which adequate arbitration legislation would tend to give, is urgent. The demand for legislation, as uniform in the several states as may be, on the part of commercial institutions national in scope, is reasonable. The popular discussion of the subject incident to the enactment of statutes recently in many states and the passage of the act of Congress, effective January first of this year, renders the present an appropriate time to submit the matter to our legislature. This discussion is not professional merely, but

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<sup>5</sup>50 REPORTS OF AM. BAR ASSN. 135 et seq.



is assuming political proportions. For instance, our Secretary of Commerce has announced as one of the eleven major directions of his efforts, the "stimulation of commercial arbitration in order to eliminate the wastes of litigation."<sup>6</sup> With the inauguration in 1923 of a Court of Commercial Arbitration by the International Chamber of Commerce and the rapidly increasing importance of the subject in foreign commerce, in which Texans because of their trade relations with Mexico are especially interested; with the tendency promoted by the United States Chamber of Commerce acting through local organizations, for business concerns of different parts of the country to arbitrate their differences, rather than to rely on juries at the domicile of the one or the other of the parties; and with business now desirous of taking from taxpayers a measurable item in the expense of conducting courts, the expenses to the state in this connection having been mounting rapidly, and in increasing proportion to wealth and population of the state in recent years; the stage is set for a successful assault on the Texas Legislature for the enactment of a modern arbitration statute to replace the one now on our statute books.

The present statute is inadequate and has fallen into practically complete disuse. Though in unimportant respects the phraseology has been changed and the division of the statute into articles has been altered in various revisions of the statutes, the statute on arbitration, now REV. CIV. STAT., 1925, Articles 224-238, is the same as that enacted in 1846. In many respects the statute can be improved upon. But the wonder is that in view of its early enactment the statute is as good as it is. On comparison with statutes of other states, excluding only the more recent statutes enacted during the last ten years, to which reference has heretofore been made, this arbitration statute is far superior, especially to those prevalent at the time of its enactment.

The Texas statute is comparable chiefly to the Louisiana statute. Each is doubtless a development of the French code.<sup>7</sup>

The advantages of this old Texas statute over the common law on arbitration are many. The statute contemplates the execution of an agreement to arbitrate and the filing of this written agreement in the court of appropriate jurisdiction; thereupon the parties are bound to that mode of trial by provisions which give to the party

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<sup>6</sup>Thirtieth Annual Report of the Secretary of Commerce, 1925, p. 3.

<sup>7</sup>A comparison of the statute with the provisions relating to arbitration in "The Legislative Treasure," being the civil code of Louisiana as published in 1825 which was used largely, according to repute, by the early Texas legislators, seems to indicate conclusively the source of the Texas statute.

not in default, on default of his adversary, a plea in bar to any suit, or if the party in default be a defendant, a plea in bar to any defense asserted. Though specific performance of the arbitration agreement is not provided for, it would seem that this mode of compelling the arbitration to continue would be effective. The statute then provides for trial before the chosen arbitrators, directing that such trial "shall proceed in like manner with trials in the courts of this State," and directs that the award upon the agreement of the arbitrators shall be filed with the court and in the absence of an appeal shall in due course be entered and recorded as the judgment of the court, on which enforcement may be had "with like effect as other judgments of said court."

This statutory arbitration is shown by the early Texas reports to have been in general use in Texas for many years following the enactment of the statute. In its earliest reports, the Texas Supreme Court passed with frequency on questions involving a construction of the arbitration statute or questions of arbitration procedure. And then, for no reason apparent on a survey of the decisions of the Texas courts, the use of statutory arbitration was discontinued. At the time when courts were few and distances which parties and witnesses were required to travel to attend court were great, statutory arbitration apparently was popular. Again, in reconstruction days arbitration apparently revived. But since 1880, at least in so far as the Texas reports show, there have been practically no statutory arbitrations. Perhaps if the congestion of our courts should now increase or if our procedural reforms are too long pending, arbitration under the present statute would again become popular.

Though the statute has several disadvantages when compared with the more recent statutes in some of the other states, it certainly is not unworkable; and the interpretations of the statute generally by the Supreme Court of Texas have given the procedure as wide a scope as permissible.

The first and most important question of construction of the statute related to the effect of an award; whether judgment should be entered on an erroneous award; and whether a party defeated in the proceedings before the arbitrators should be entitled to relitigate the issues, either of fact or of law, at the time judgment on the award is entered, or thereafter on appeal from the judgment. In the first case before the original Supreme Court it was decided in an opinion by Chief Justice Hemphill that the award is conclusive, on issues both of fact and of law:

Where arbitrators knowing what the law is, or leaving it

entirely out of their consideration, make what they conceive under the circumstances of the case to be an equitable decision, it is no objection to the award that in some particular point it is manifestly against the law.<sup>8</sup>

In certain circumstances, as where the award is begotten of fraud or misconduct of the arbitrators, the Texas courts, in accord with the general practice, have permitted a reopening of the issues and a setting aside of the award. Whether a mistake of the arbitrators will permit this, seems doubtful under some of the later decisions. Several of the cases talk about the duty of a court to set aside an award if resulting from "fraud, partiality, misconduct or gross mistake."<sup>9</sup> What mistake is "gross" may not be clear, or whether a mistake of law is included within the term. It is submitted, however, in view of the decision of Chief Justice Hemphill, wherein an award was made against a debtor who under the undisputed facts had a clear defense of usury, that the mistakes referred to are of fact only. Apparently the question whether such a mistake has been committed is for determination by a court and not by a jury.<sup>10</sup>

The statute details the mode of trial before two arbitrators, one selected by each of the parties, and provides for the appointment of an umpire only in the event of a disagreement between these arbitrators at the trial. This would apparently make necessary a second trial before the umpire and two arbitrators. Such an unfortunate result, however, has been held not to be necessary, the provisions being deemed to be directory only. The parties may waive the first hearing before two arbitrators and even if they do not waive the objection that such first trial has not been had, it is deemed to be one relating to form only, and the award pursuant to the single hearing before the three is held to be a good statutory award.<sup>11</sup> This is one of many illustrations of the liberality with which the Supreme Court of Texas has construed the arbitration statute.

The parties are privileged under the statute to reserve an appeal from the award in the original agreement to arbitrate; when such a right is reserved the proceedings before the arbitrators are practically of no effect, for upon the filing of an appeal the award is set aside and the controversy stands for trial *de novo* before the court. The futility of such proceedings before arbitrators would seem to

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<sup>8</sup>Edrington v. League, 1 Tex. 64, 68 (1847).

<sup>9</sup>Payne v. Metz, 14 Tex. 56 (1855); Forshey v. G. H. & H. R. R., 16 Tex. 516 (1856).

<sup>10</sup>Schulte v. Hoffman, 18 Tex. 678 (1857).

<sup>11</sup>Forshey v. G. H. & H. R. R., note 9, *supra*.

render this provision, however, of little effect, for if the parties did not desire to arbitrate the matter once and finally, they presumably would not enter into an agreement for arbitration. The statute provides that unless an appeal is expressly reserved no such right shall exist.

The statute specifically provides that upon the filing of the agreement a day, "not less than two days thereafter," shall be designated for a trial before the arbitrators and provides that "for good cause shown" the arbitrators may continue the hearing to some other day, or during the progress of the trial, "for good cause," may adjourn from time to time. These provisions, if too strictly construed, might prove burdensome in arbitration proceedings, especially if statutory grounds for continuance and postponements were required. Unquestionably, however, under the liberal construction by the Supreme Court an objection as to the time of hearings must be shown to be prejudicial.<sup>12</sup>

The statute provides for the issuance of process for witnesses at the trial. There is no express provision in the statute for obtaining testimony by depositions if the witnesses are not available or for discovery proceedings in advance of trial or for the requirement of the production of documents by process *duces tecum*. Perhaps, though the question has apparently never been decided, these practices would be permitted under the provision that "the trial of the cause shall proceed in like manner with trials in the courts."

The clause last referred to, however, probably contains within it one of the chief reasons for disuse of the statutory arbitration. Under this provision arbitrators are not expected to make investigation on their own initiative. They are expected to pass on evidence properly presented to them in accord with the principles of evidence on which our courts act. Such a provision would doubtless be wise in cases where the arbitrators are sufficiently learned in the rules of law to pass intelligently on objections whether certain evidence should be considered or not. But if the arbitrators are not acquainted with rules of evidence and yet by their oaths are obliged to follow such rules, resulting confusion is to be expected. Unquestionably, it is submitted, the arbitrators should be required to have a working knowledge of the laws of evidence and procedure under which they are required to act or the arbitrators should be given a discretion as to the manner in which the procedure shall be had and the admissibility as well as the effect of evidence introduced. Arbitrators generally, it would seem from

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<sup>12</sup>Green v. Franklin, 1 Tex. 497 (1847).



a review of the decisions in the Texas reports, were honest neighbors unhampered by knowledge of rules of evidence; to require such arbitrators to act in consonance with rules of evidence and "the law and equity applicable to the facts proved," was to place before them a standard which could only lead to uncertainty and confusion. If a guess were to be hazarded as to the reason for the failure of our statutory arbitration to function this would seem to be the chief factor.

Another defect in our arbitration statute lies in the failure to require a precise definition of issues to be passed upon. The statute contemplates a broad agreement "to arbitrate their differences or matters in dispute," whereas practically all of the other statutes on the subject, and certainly all the recent ones, require a definition of the specific issues. A natural consequence of uncertainty on this matter is the difficulty of defining subsequently what claims not reduced to judgment were denied in the award. To permit the parties or an arbitrator<sup>13</sup> to testify as to what the matters were which were passed upon in reaching an award is to recognize this defect.

Another defect in the statute is its failure to provide for the continuance of arbitration proceedings should the arbitrators refuse to proceed or should the arbitrators fail to follow the statutory requirements. Of course, if an award results the parties may be bound by operation of common law,<sup>14</sup> but unless the arbitrators are willing to proceed under the statute it would seem that no way exists to compel an award.

And so for these reasons and perhaps for others statutory arbitration in Texas has practically ceased to exist. The court records of Dallas County, for example, do not show the filing of a single agreement for statutory arbitration for the last five years. Several practitioners of long experience have stated that the procedure under the statute has remained practically unknown during their professional lives. Some common law arbitrations have been had, especially in circumstances where required as condition precedent to a recovery, as under an insurance policy; for there the chief objection to a common law arbitration, that it remains voluntary even after submission, may be avoided by the requirement that arbitration shall be a condition precedent to recovery. But even common law arbitrations have been rare in Texas.

For these reasons, Texas needs a new statute. Perhaps with enactment of one similar to the federal act now in effect, arbitration

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<sup>13</sup>Holcomb v. Blankenship, 180 S. W. 918 (Tex. Civ. App., 1915).

<sup>14</sup>Hooker v. Williamson, 60 Tex. 524 (1883).

would again come into vogue. Radical over-night change to this effect is not to be expected but as some attempt the procedure and are pleased with it others may be expected to follow. A slow and steady growth should be expected. Of more importance, the tendency toward settlements and conciliation would grow in like proportions, for by experience, arbitration and conciliation are shown to work hand in hand.

The federal statute and all of the more recent state statutes give to the arbitrators a discretion as to the procedure prior to the award, as to what evidence shall be considered and as to the acquisition of additional information on the initiative of the arbitrators. Lay arbitrators are generally chosen. The procedure is an outgrowth chiefly of arbitration agreements in trade associations wherein members of the same trade pass as arbitrators on disputes among their fellows. The chief success of arbitration has been in trade lines in England and in America. Hence the subject is known as commercial arbitration, as if limited to commercial controversies and is generally discussed as if applicable only to cases to be determined on issues of fact. In such disputes, arbitration has been peculiarly successful as compared with jury trials. In a case where there is an issue of custom, or technical issue of fact, the jury is especially inept. Jurors have to be educated by expert testimony, a tedious and costly process. Emotional elements frequently overcome exact expert testimony. In such cases arbitration works to best advantage with expert arbitrators having full discretion.

Unfortunately, however, the subject of arbitration is being treated as if limited to such cases. Commercial organizations are looking to laymen for arbitration and not to lawyers. Rules of procedure and of evidence, whether reasonable or unreasonable, whether tending to justice and expedition of business or not, are being cast aside and the average man with an unbridled discretion given final and arbitrary power. The results are that arbitration is being limited to fact cases of a particular type, although its effectiveness should be just as great in other cases; that the profession of law is losing an opportunity to lead, as to the other types of cases, where business desires to be led; and that a conception is arising that arbitration is in conflict with law and lawyers, so that lawyers are not expected or welcomed as arbitrators or as counsel.

There is no reason why types of cases in which legal questions are determinative may not be arbitrated by expert arbitrators guided by the legal principles, just as an arbitrator expert in a trade may pass best on a case involving solely an issue of trade custom. There

are many advantages to be had in arbitration of such cases. A single determination of the controversy by the arbitrator is usually preferable to a determination of the question by a trial court, and a review of the same question by appellate courts. By arbitration, time, effort and expense may be saved. A forum of the choice of the parties may be selected. In cases of importance lawyers of attainments which too infrequently adorn the bench may be persuaded to accept the role of arbitrator. Political and other influences which sometimes are thought to affect the bench may be avoided. A prompt, inexpensive and final decision may be expected.

Though not within the contemplation of the leaders in the movement who have succeeded in obtaining the recent legislation on the subject, these recent statutes fit admirably this conception of the opportunity for lawyers. The statutes permit the choice of one or more arbitrators as the parties may select. Though no limitations on the discretion of the arbitrator are prescribed by statute the agreement for arbitration may effect such limitations as may be desired in the particular case. There seems no reason under such statutes why an issue involving purely a question of law may not be submitted to a skilled attorney as arbitrator; or why if a case involves issues both of fact and of law, all issues may not be submitted to such an attorney or if preferred that the issues of fact may be submitted to a lay arbitrator and those of law to an attorney.

In England the use of barristers is common both for determining facts and the law. Certain barristers have become specialists as arbitrators in disputes in the building trades,<sup>15</sup> others in admiralty controversies,<sup>16</sup> and others on insurance claims.<sup>17</sup> The practice is not uncommon, where there is more than one arbitrator to join one barrister with one or more laymen, though

The general feeling among experts in arbitration is that a sole arbitrator is far better than two or three.<sup>18</sup>

The development in this country, in so far as I have been able to learn, is almost exclusively with arbitrators untrained in the law; their arbitration, of course, being limited to cases where issues of fact only are involved. Several years ago, however, Mr. Percy Werner of St. Louis suggested the general use of attorneys as arbitrators, pointing out that in every community there are lawyers

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<sup>15</sup>ROSENBAUM, REPORT ON COMMERCIAL ARBITRATION IN ENGLAND, 39.

<sup>16</sup>*Ibid.*, 36.

<sup>17</sup>*Ibid.*, 28.

<sup>18</sup>*Ibid.*, 26.

competent to perform judicial functions, possessing the confidence of the bar, who could pass on many civil suits without the delays and other disadvantages complained of in court procedure.<sup>19</sup> Mr. Werner argued that public courts in a democratic society should be reserved for public actions.

It is suggested, therefore, that the members of the bar individually and that bar associations as organizations should take a pronounced stand in favor of arbitration of all arbitrable disputes to the end that the costs and delays incident to their determination in court may be reduced; that arbitration of controversies of law by lawyers should be encouraged; and that the movement for arbitration which has already attained nation-wide scope as a result of the efforts chiefly of laymen should have the active support and cooperation of the bar so that arbitration may develop not in opposition to our profession but as a favored method of procedure for lawyers as advisors of clients, as arbitrators and as attorneys in presenting controversies before such arbitrators.

*Paul Carrington.*

Dallas.

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<sup>19</sup> JOURNAL OF AMERICAN JUDICATURE SOCIETY, 80.



## LEGAL EDUCATION IN FRANCE

The writer makes no pretense at giving in this article more than a general sketch of the methods pursued in fitting young men for the bar in France. It was thought that any extended study and compilation of statistics would be of little value to the average reader and would detract from what general interest may be found in the subject. Inasmuch as all the law schools in France are under the direct control of the state, and regulated in many respects even to the smallest details by statute, the writer has taken one school as being representative and traced the methods there followed.<sup>1</sup> In a few instances there is a difference in practice among the schools, though not in theory, and in such cases mention will be made of the fact. The University of Paris, a school with approximately ten thousand students, was selected because it offers the greatest facilities for study and was open to first hand investigation.

In the French school of law there are found three distinct types of students, each with different ends in view. While students in the American schools of law are likewise divided in their purposes, there is no such official recognition of it as is found in the French school, where special facilities are provided for each type.<sup>2</sup> Each division will be treated separately, beginning with the least important.

## COURSES OF STUDY

A. The first class is composed of persons who are called *auditeurs*, for they do no more than attend the lectures, and are not recognized as students in the full sense of the word. Anyone may be an *auditeur* who is of good moral character and who has complied with certain formalities. These *auditeurs* come to the lectures for various reasons, and in general may be divided as follows: 1. Foreign students and professors desiring to learn French legal terminology and gain a first hand acquaintance with French legal thought. 2. Business men of all types who attend certain of the lectures which may

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<sup>1</sup>There are law schools connected with fifteen French universities located at Aix, Alger, Bordeaux, Caen, Dijon, Grenoble, Lille, Montpellier, Nancy, Paris, Poitiers, Rennes, Toulouse, and Strasbourg. Besides these schools there were founded by a law of 12 July, 1875, eight "écoles libres de droit" having the same entrance requirements as the state schools, but unable to give the required examinations which must be taken at one of the fifteen "facultés" above mentioned.

<sup>2</sup>Loi du 22 ventôse an XII, art. 3 à 12. Décret du 4e. jour comp. an XII, art. 28, 33 à 46.

be of practical value to them in their business (commercial law, maritime law, etc.). 3. Students preparing theses and who attend certain lectures which touch upon their chosen subject.

These students are not entitled to take the examinations, and no official recognition is made of the fact that they have attended the courses. They merely pay a small sum for the privilege of listening to the lectures, and no demand is made on them except that they maintain proper order. Obviously this type of student cannot be compared with his seeming counterpart in the American universities, for the *auditeur* in America almost invariably attends for the purpose of preparing himself to take the bar examinations. In France one may not be admitted to the bar without a *licence en droit*, the nature of which is explained below. Thus the *auditeur* in America may best be considered as a bona fide student of law, since he intends making the law his profession. The French *auditeurs* may be described as the students who wish to follow the lectures for personal reasons unconnected with the practice of law in France. They make up a considerable proportion of the French students, particularly in the large cities.

B. The second class is composed of those students who do not intend to practice law, but whose business or profession requires that they be proficient in those subjects whose domain is practical rather than classical. In this class come a large number of persons who intend working at various positions in the offices of lawyers.<sup>3</sup> There are no preliminary scholastic requirements for entrance into the studies which lead to a *Certificat de Capacité en Droit*, the only requirements being merely formal.<sup>4</sup>

The period of study extends over two scholastic years,<sup>5</sup> and it is to be noted that the scholastic year is of only eight months' duration in all French schools save the *Faculté de Médecine*. The student is required to undergo both oral and written examinations at the end of each year. He is permitted little freedom in the selection of his courses, the following being obligatory:<sup>6</sup>

#### *First Year*

*Elements of Civil Law*.—Comprising a study of the CIVIL CODE from Article 1 to Article 1100.

<sup>3</sup>This certificate also allows one to become an "avoué," a sort of ministerial officer who corresponds to the English solicitor in many respects. However, the *licence* is demanded in Paris to perform this function.

<sup>4</sup>Livret de l'Étudiant. Univ. de Paris. 1925-26. P. 29.

<sup>5</sup>Loi du 22 ventôse an XII, art. 3 à 12.

<sup>6</sup>Décret du 14 février 1905. Arrêté ministériel du 30 avril 1906.

*Elements of Criminal Law.*—a. Penal Code—distinction between crimes, infractions and minor offenses; scale of punishments; recidivism; complicity in crimes; defenses and excuses; extenuating circumstances; non-cumulation of penalties; police regulations.

b. Elements of Criminal Procedure.

*Elements of Public and Administrative Law.*—The Constitution of 1875 and the organization of public offices. Electoral system. Administration: agents, administrators, administrative tribunals. Decentralization: departmental administration; communal administration. Public works. Public finance. The budget. Taxes.

These obligatory courses comprise the work for the first year, and no optional courses are allowed. For civil law there are two examinations, for the other subjects only one each.

### *Second Year*

*Elements of Civil Law.*—From Article 1101 to Article 2281 of the CIVIL CODE.

*Elements of Civil Procedure.*—Organization of the civil judiciary; procedure in justice of the peace courts; procedure in tribunals of *Arrondissements*; procedure in commercial courts; methods of appeal; methods of execution.

Besides the above obligatory subjects in the second year, the student must choose one of the following subjects:<sup>7</sup> Commercial law, registration, or industrial law. At the end of this year, if the student is accepted he is entitled to the *Certificat de Capacité en Droit*.

C. The third and most important group is that of students "qui font les diplômes normaux," which expresses the fact that those students who do not fall within this group are considered exceptional, and those within it are considered the normal students of law. For entrance into these studies the student is required to have completed his secondary education, which means, in France, that he has attained his *baccalauréat*, which is considered equivalent to the American and English B. A. or B. S. degree.<sup>8</sup> No exception is made to this rule except that by recent legislative enactment certain degrees from French technical and colonial colleges are acceptable in lieu of the *baccalauréat*.<sup>9</sup> The studies cover a period of three scholastic years and lead to the *Licence en Droit*, which gives the

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<sup>7</sup>*Ibid.*

<sup>8</sup>Arrêté du 16 novembre 1915, art. 1. For the United States degrees required see an Arrêté ministériel du 30 novembre 1918.

<sup>9</sup>Décret du 22 juillet 1912.

privilege of practicing law in the French courts after having met the requirements of the bar.<sup>10</sup> The subjects covered during the first two years are composed entirely of required subjects and are as follows:<sup>11</sup>

### *First Year*

*Roman Law.*—Historical exposition of Roman juridical institutions, including the elementary study of the theory of obligations. (Two semesters.)

*Civil Law.*—The study is in logical rather than chronological sequence. The details are too complicated to give here. (Two semesters.)

*Political Economy.*—Study of the production and circulation of wealth. (Two semesters.)

*Elements of Constitutional Law.*—The state: its nature and forms. Establishment and revision of constitutions. Direct and representative government, Organization and functioning of powers. Public liberties in the Declaration of Rights. The French Constitution and the most characteristic foreign constitutions (England, United States, German Empire, and Switzerland). (One semester.)

### *Second Year*

*Civil Law.*—Continuation of the first year. (Two semesters.)

*Roman Law.*—The theories of obligations studied with reference to French law. (One semester.)

*Criminal Law.*—General principles of criminal law and criminal procedure. (Two semesters.)

*Administrative Law.*—General principles. Organization of public utilities. Agents, administrators and tribunals collaborating with the administration. (Two semesters.)

*Political Economy.*—Transports. International commerce. Assessment of taxes. Social questions. (Two semesters.)

At the end of this year the student having passed all his examinations receives the degree of *Bachelier en Droit*, which, however, confers no new rights or duties upon him.<sup>12</sup>

<sup>10</sup>This degree is demanded to practice as "avocat" in the courts. Loi du 22 ventôse an XII, art. 23-24. It is also demanded for a large number of ministerial positions.

<sup>11</sup>Décret du 2 août 1922.

<sup>12</sup>The only value of this degree except for entrance into certain other courses of study is that it replaces the *capacité* in the smaller cities where that diploma carries with it the right to become an "avoué."



*Third Year*

*Civil Law*.—Continuation of first two years. (Two semesters.)

*Commercial Law*.—Corporations. Stock exchanges. Contracts. Judicial liquidation. Bills and notes. Bankruptcy. (Two semesters.)

*Civil Procedure*.—General principles. Study of the code. Organization of the civil judiciary. (One semester.)

*Financial Legislation*.—General theory of public expenditures. Public credit. Public revenue. Taxes.

*Private International Law*.—Nationality. Status of foreigners. Conflict of laws. Competence of courts and international effects of judgments. (One semester.)

Besides the above required courses of the third year, the student is required during the second semester to supplement them with two other courses which he is allowed to choose from a list prepared by the faculty and approved by the Minister of Education.<sup>13</sup> These subjects, of course, differ with each school. Those offered by the University of Paris for 1925-26 are: Public law, public international law, industrial legislation, colonial legislation, fiscal legislation, maritime law, complementary commercial law, and methods of execution.<sup>14</sup>

Under this same heading must be treated those students working for doctor's degrees, for that work is simply a continuation of the *Licence*. The normal time for the work is two years, but it sometimes extends to three and even five years.<sup>15</sup> The student is required to present the *Licence en Droit* for entrance.<sup>16</sup> Though provision is made for foreign students by "équivalences," as a matter of practice foreigners rarely try for it since there is a special degree offered for the foreigner aspiring to the doctorate.<sup>17</sup>

A new system has been recently inaugurated for the doctorate, by which the candidate must procure two *Diplômes d'Etudes Supérieures* before he may submit his thesis.<sup>18</sup> These certificates are given at the successful completion of one scholastic year's work in one of the following divisions:

1. Private law.

<sup>13</sup>Décret du 2 août 1922, art. 1.

<sup>14</sup>Nouveau Guide de l'Étudiant en Droit, p. 57.

<sup>15</sup>Décret du 2 mai 1925. Loi du 22 ventôse an XII, art. 3 à 12.

<sup>16</sup>Décret du 15 février 1921. Décret du 2 mai 1925, art. 2.

<sup>17</sup>Arrêté du 16 novembre 1915. Décret du 15 février 1921. As to the doctorate for foreigners see the Arrêté du 27 mars 1912.

<sup>18</sup>Décret du 2 mai 1925, art. 1 à 8.

2. History of law.
3. Public law.
4. Political economy.

In each of the above branches the student is required to take certain subjects, but has considerably more choice than in his undergraduate days. This system, which requires completion of work in any two of the fields, is rather more difficult than the old in which the aspirant merely elected to pursue his studies in either one of the divisions designated as "Juridical Science" and "Political Science."

Before beginning work on his thesis the student is required to submit his subject for approval to the professor under whom he is to work. Afterwards he must gain the approval of the dean of the law school. It is permissible to work on any subject within the limits of the courses offered, even a subject that has been previously the subject of a thesis in the same *faculté*. If the thesis, however, attempts to rework old ground, it is submitted to unusual scrutiny by the jury. It is required by law that the student furnish the faculty with ninety-five printed copies of his thesis.<sup>19</sup> After this the candidate is called upon to publicly uphold his thesis, and after public announcement he is forced to defend it before a jury of three professors and a usually friendly audience. The grilling lasts for an hour and a half, and if the student is successful he is entitled to receive his *doctorat*.<sup>20</sup>

It will be noted from the above sketch that in France and in the United States there is a fundamental difference in the subject matter which the future lawyer is required to digest, to say nothing of the difference in method of teaching. This fundamental difference, in the opinion of the writer, is not made necessary by the difference in the legal systems used in the two countries, for they tend to approach a common level; i. e., the common law tends to crystallize into set rules, which give it at least the flavor of code law, while the code law tends to yield gradually to social pressure to such an extent that common law methods are resorted to—actually, if not theoretically. It would certainly be as feasible to study French code law by the case system as by the method actually used, and on the other hand American law might be studied by the French system, thus the difference is in no way inherent in the *law* of the countries. In the view of the present writer, the divergence is due to the difference in historical background and in manner of approach to the law. The

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<sup>19</sup>Décret du 30 juillet 1883.

<sup>20</sup>Décret du 2 mai 1925, art. 23, Titre II.

French criticize their system on the ground that it gives too little time to practical matters, and many American professors find their system faulty in failing to give the student a background which will enable him to be of more real service to the development of the law after his graduation from the law school. In France, their difficulty is theoretically overcome by the fact that after receiving the *licence* the student is not a full-fledged lawyer, but a *stagiaire* who serves usually an established lawyer for three years before he becomes a lawyer in the full sense of the term. This procedure, however, is objectionable because of the time involved, and has, moreover, become rather a matter of form than of substance.<sup>21</sup>

The reader may be surprised at the presence in the courses of so many subjects which do not appear in the curricula of the American law school. This is perhaps due to the difference in the secondary education in France and America, and the assumption of the American law school that the law student has at least a working knowledge of economics and government, an assumption which, unfortunately, is not always borne out by the facts. At any rate the French law schools consider them essential elements in the making of a good lawyer, and attempt to make certain that each graduating student has those elements.

#### EXAMINATIONS

Here again there is a wide divergence in the French and American practice. The French examinations are both written and oral, though the written matter would hardly be considered an "examination" by the American law student. It consists in writing a three-hour paper on one of the required subjects at the end of each year when the *capacité* is sought, and two such papers when the student aspires to the *licence*.<sup>22</sup> In the latter case, of the subjects to be written one is known before the examination and the other is unknown. This procedure is open to objections too obvious for discussion. Besides these one or two written papers, the student is examined orally before a jury of three professors on each of the subjects for the year, excepting that which was the subject of the written paper. The examination on each subject is of about thirty

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<sup>21</sup>This system theoretically involves study under an established lawyer for three years before full admission to the bar is given, the *stagiaire* meanwhile not pleading in the courts. As a matter of fact the student when he finishes the law school is as much a lawyer as his American cousin, except that he has not been officially recognized as such. In Germany the system is actually carried out, and the graduate finds that he has several stages (usually of six months each) to go through before he can practice in the courts.

<sup>22</sup>Décret du 2 août 1922, Titre II, art. 4.

minutes duration usually, but is entirely at the discretion of the jury. The oral method seems hardly fair, for it is impossible to test in such a short time the student's knowledge of a year's work, and it is open to the further objection that the student is under a strong psychological strain when he sits alone before the jury of professors. Furthermore, the examiners have no other means of judging the student as no recitations are made in the classes. The grading is in figures of from 1 to 20, and the candidate is required to obtain an average of 10 for the *capacité*, the *baccalauréat*, and the *licence*,<sup>23</sup> while an average of 14 is required for the *doctorat*,<sup>24</sup> and should the candidate for the doctorate fall below 10 in any subject, he is temporarily out of the race and must await the result of a special deliberation of the jury on his case.<sup>25</sup>

The written examinations as well as the oral are taken in special rooms reserved and used only for that purpose. The rooms for the written examinations are arranged so as to give the director of the examination the maximum field for observation, for the honor system is unknown.<sup>26</sup> The student is not allowed to bring any books into the room, and may leave the room only by special dispensation.

Another interesting feature of the examination system is that if a student fail in the examination at the end of the year he is entitled to take another just before the opening of the next year. Should he again fail he may not again register until the year following.<sup>27</sup>

The examinations result in a surprising number of casualties, an average of about 40 per cent only of the students taking the examinations being accepted. This excludes the period during and immediately after the war, when a great deal of laxity prevailed.

#### LECTURES AND CLASSROOMS

Though the French professor in his flowing black robes trimmed with scarlet and ermine is a picturesque and learned figure,<sup>28</sup> the fact remains that his lectures very often fail to hold the interest of the class. This is particularly true in the historical subjects, and in those dealing with the codes. They being more or less staple in their content it is inevitable that the lectures often become a mere

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<sup>23</sup>*Ibid.*, art. 12.

<sup>24</sup>Décret du 26 février 1913, art. 4.

<sup>25</sup>*Ibid.*

<sup>26</sup>Décret du 21 juillet 1897, art. 41, Décret du 2 Août 1922, Titre II, art. 8.

<sup>27</sup>Arrêté du 24 février 1923, Titre II, art. 18 à 20.

<sup>28</sup>The robe is not worn by all the professors, but is worn by the majority, it being one of the rights accorded with the doctor's degree.



recitation of words which the professor knows by heart, a condition which is avoided under the American system by the ever changing content of the subjects offered, and by the stimulation offered by a classroom discussion. Of course this does not hold for the courses where the subject matter is less fixed, and the introduction of younger blood after the war has led to an appreciable change in the atmosphere of the classroom. Not so many years ago, for instance, it was considered an act of rank heresy for a professor of law to even recognize the existence of the *Cour de Cassation*, much less to cite one of its opinions interpreting the code. The student was fed the interpretation held by the particular professor and that was all. Of course this is changed now and the students are even encouraged to dig freely into the *Dalloz*.

It is proper here to mention that although attendance at lectures is theoretically obligatory, the rule is not always enforced in the larger universities. It would be impossible to enforce it at the University of Paris, for instance, as the student body far outnumbers the maximum which the building could handle. Consequently a large number of students never attend classes, and some even continue their work in the city. Even in *province* the matter of attendance rests entirely with the professor, and though many of them in the smaller schools make occasional surprise roll calls, others never do so, and there is no systematic attempt made anywhere to check attendance. A large number of the lectures are the same each year, while others have only minor changes, so that it is possible to procure them from stenographic bureaus near the various *facultés* which vend them in mimeograph form.

#### AUXILIARY AIDS

Conferences in groups limited to thirty students take place several times a week under the direction of a professor, and have for their object the directed expression of individuality on the part of the students, and to introduce them into the practical phases of the practice of law.<sup>29</sup> The courses are not obligatory, but the better students are always in attendance. Their object is somewhat similar to that of the various societies which are to be found organized among the American law students, and a report of each student's work is sent at the end of the year to the examination jury which takes it into account in fixing the student's grade.<sup>30</sup> These conferences

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<sup>29</sup>Arrêté du 30 avril 1895.

<sup>30</sup>*Ibid.*, art. 8.

exert a marked influence over the students who attend them, and might be adopted with profit by law schools in the United States.

Besides these conferences there are situated in the law building nine *Salles de Travail*, each for a given subject. The number of *salles* varies with the different schools, but the system is followed by all. Those at the University of Paris are for the following subjects: Roman law, history of law and canon law, public law, commercial and maritime law, statistics and political economy, civil law, penal science and comparative civil legislation.<sup>31</sup>

Each of the *salles* contains a complete library on the subject to which it is devoted and is directed either by a professor or a graduate student specializing in the subject. Every facility is offered for research work in the subject, while the presence of the director often gives him an opportunity to stimulate the student, and offers the student the opportunity not only to have his difficulties untangled by expert hands, but he is also assured of coming into contact with other students interested in the same subject.

There is also provided a course in English, German, and Spanish legal terminology, an elective course intended to give the student a reading knowledge of legal literature in any of the above languages.<sup>32</sup> An elective course in diction is also given each year by a member of the *Comédie Française*.

Besides the aids above mentioned, the student is encouraged to call upon his various professors, a matter which the better students do not fail to take advantage of, for this personal lien is probably considered of greater value in Europe than in America. All the large law schools are equipped with a number of reception rooms, where the professors may receive students and other visitors under the most auspicious circumstances.

It may be mentioned here that there are a large number of prizes and scholarships which are offered not only by private individuals and organizations but by the French Government. The prizes offered by the state are uniform for each of the *facultés* and are of four sorts—for the *doctorat*, for each of the three years of the *licence*, for the *auditeurs*, and finally a prize for a contest between the third year *licence* students in all the *facultés*.<sup>33</sup> Besides these state prizes, there are many others offered at the various schools by individuals, organizations and the municipality. There are twenty-four prizes

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<sup>31</sup>Nouveau Guide de l'Etudiant en Droit, 1925-26, p. 137.

<sup>32</sup>Nouveau Guide, etc., p. 144.

<sup>33</sup>Décret du 27 décembre 1881.

of this type offered at the University of Paris alone.<sup>34</sup> Needless to say, this sort of incentive is very fruitful.

### DISCIPLINE

Formerly the universities were governed internally by a sort of penal code furnished by the state,<sup>35</sup> and the disciplinary measures taken against students were of much the same procedure as in the criminal and police courts, but that system has long been out of use and a large liberty is now given to the various universities in taking care of their own internal regulation.<sup>36</sup> Certain matters, however, are still defined as contrary to good discipline or as *délits* by law, such as cheating on examinations, false registration, etc., and the penalties for them are provided.<sup>37</sup> Further, the type of punishment that may be inflicted in any case is regulated by law, varying in severity from simple reprimand before the University Council to complete and perpetual expulsion from all the schools of the state.<sup>38</sup>

It is interesting to note the difference in the French and American attitudes toward cheating on examinations. In France cheating on examinations as well as falsifying any of the papers necessary to the student is a criminal offense upon conviction of which the student is subject to imprisonment for from one month to three years or a fine of from 100 to 10,000 francs, or both.<sup>39</sup> The same punishment is meted out to all the parties concerned in the cheating, and the wording of the law would lead one to believe that the person furnishing the means of cheating (i. e., the giver of the information) is considered a bit more blameworthy than the person who accepts them.<sup>40</sup> This public action does not in any way reduce the penalty which may be assessed by the university itself, which may be complete and perpetual expulsion from all state schools.<sup>41</sup>

<sup>34</sup>Nouveau Guide, etc., pp. 145-162.

<sup>35</sup>Décret du 30 juillet 1883.

<sup>36</sup>Décret du 21 juillet 1897.

<sup>37</sup>*Ibid.*, art. 7, 11, 12, 17, 36.

<sup>38</sup>*Ibid.*, art. 34.

<sup>39</sup>Loi du 23 décembre 1901.

<sup>40</sup>*Ibid.*, art. 2. "Quiconque se sera rendu coupable d'un delit de cette nature, notamment en livrant à un tiers ou en communiquant sciemment, avant l'examen ou le concours, à quelqu'une des parties intéressées, le texte ou le sujet de l'épreuve, ou bien en faisant usage de pièces fausses, telles que diplômes, certificats, extraits de naissance ou autres, ou bien en substituant une tierce personne au véritable candidat, sera condamné à un emprisonnement d'un mois à trois ans et à une amende de 100 francs à 10,000 francs ou à l'une des peines seulement."

<sup>41</sup>*Ibid.*, art. 5.

The procedure in cases where the student is accused of infraction of the rules of his *faculté* or university is provided by law and is followed implicitly.<sup>42</sup> It provides for notice by registered mail to the student; allows him to defend himself personally or by written argument, and in some cases he may be represented by counsel. A permanent *commission*, whose duty it is to take the preliminary steps, is established in all the schools, but the actual trial takes place before the *Conseil de l'Université*, which is composed of both faculty members and students chosen by popular election. In matters where the penalty given is less than complete expulsion from all the state schools the decision of the *Conseil* is final, but if the penalty meted out is such expulsion an appeal is provided to a national body called the *Conseil Supérieur de l'Instruction Publique*. This is in order that each university may be complete mistress of her own yard, and at the same time be prevented from arbitrarily taking all opportunity for higher education from a student.

#### INSTITUTS

Connected by law with the various law schools, as well as certain other branches of the public education, there are certain *instituts* whose purpose it is to provide proper facilities for the student who wishes to specialize. These *instituts*, though connected by law with a certain *faculté* and delivering its diplomas in the name of that *faculté*, are autonomous in all internal matters.

The *instituts* at the University of Paris are three in number—*l'Institut de Criminologie*, *l'Institut de Statistique*, and *l'Institut des Hautes Etudes Internationales*. Since only the first and last above mentioned would properly come under any of the American legal rubrics, they alone will be described.

The Institute of Criminology<sup>43</sup> divides its instruction into four sections, each leading to a certificate or diploma at the end of the work. The student is required to have received either his *Bachelier en Droit* or *Capacité en Droit* before entrance, though the dean of the law school may accord a special dispensation in cases which he deems worthy. Each of the four divisions will be described separately.

A. *Section of Criminal Law*.—This division is devoted almost entirely to the theory and practice of penal law in all its ramifications, though the elements of legal medicine are also entered into. There is provided a general study of penal law which deals with

<sup>42</sup>Décret du 21 juillet 1897, Titre III, ler décret.

<sup>43</sup>Décret du 26 juillet 1922; Annexe du décret du 25 juillet 1924.



existing laws and a critique of them and a special study which has to do with the theory of criminal law as well as a study of comparative penal legislation. Procedure is studied both for the knowledge of existing practice and for individual work in suggestions for simplification and correction of faults.

Besides this study of the law itself, there is required a study of cause and effect; i. e., criminology and study of punishment (*science pénitentielle*). Thus the student is able to more intelligently defend or combat a law which seems to him to be good or bad. This secondary instruction, though well within the province of criminal law, would hardly find a place in the American law school as now organized, and would require the student to pick it out piecemeal from courses given in the departments of science.

B. *Section of Legal Medicine*.—This section of the institute is of lesser importance, but nevertheless affords an opportunity for study of this branch of the law, which is practically untaught in our law schools. Its principal claim to attention on the part of the lawyer is that it includes a study of mental diseases and just how far the individual should in law be held responsible for his acts. The subsidiary courses in this section include a less specialized study of the principle courses in Sections A and D.

C. *Scientific Police Regulation*.—This section covers a general study of legal medicine, legal psychiatry, the elements of criminal law and criminal procedure, besides the study of *police scientifique* which is stressed in the same manner that the major subjects of the two above sections are emphasized.

D. *Penitentiary Science*.—Criminology and the study of curative methods for the criminal are the major subjects of the section. They are supplemented by studies of the CRIMINAL CODE, the CODE OF CRIMINAL PROCEDURE, elementary science of police, elementary legal medicine and the elements of criminal anthropology and mental diseases.

Before leaving this subject the writer would emphasize the importance of this *institut*, and the desirability, if not the imminent necessity, of some such organization in the law schools of the United States. The institute here outlined is not offered as a pattern, for it presents much that would be objectionable from the standpoint of present American needs (the divisions, for instance, would practically destroy its efficacy for American purposes), but it is the basic idea that is to be underlined—a comprehensive and intensive study of the criminal law and such secondary subjects as will insure an intelligent attack of the many problems this branch of our

law offers. Such a study would not be possible under the standard law school curriculum, and it is submitted that the establishment of some such subsidiary organization under the direct supervision of the law school would bring the most fruitful results.

The *Institut des Hautes Etudes Internationales*<sup>44</sup> is devoted entirely to the study of international law, both public and private. The normal course of study is two scholastic years and leads to a diploma delivered in the name of the university. This institute caters especially to foreigners, and as many as forty-two different nationalities have been represented in its classes. The lecturers are authorities from many different countries, and change from year to year. Both the United States and South America have been represented on its faculty. It is interesting to note that one of the *fondateurs-directeurs* is secretary of the *American Institute of International Law*.<sup>45</sup>

The aim of the institute is to give instruction in both branches of international law as well as to bring together students of different nationalities and give them the opportunity of studying each other's viewpoints.

In the view of the writer, the French system suffers much from the restraints imposed by tradition, yet that tradition is of sound value in inspiring the serious student with the responsibility of keeping the tradition alive. Even though he may leave the law school with but a vague idea of the actual practice of law, he is funded with a rather complete knowledge of legal theory, with the rich and inspiring history of the legal order and is thoroughly conscious of his social responsibility. Unhappily the exceptions to this description of the French law graduate grow yearly larger, perhaps due to the breach made by the late war, but it still represents the rule.

John P. Bullington.

Paris, France.

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<sup>44</sup>Décret du 31 juillet 1920.

<sup>45</sup>Dr. A. Alvarez.

## SUGGESTIONS FOR IMPROVING COURT PROCEDURE IN TEXAS

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Under this general heading will appear from time to time pertinent suggestions for improving and speeding up our judicial machinery. Our readers are invited to send in for publication in this department brief, concrete suggestions, or discussions of suggestions made by others. Communications for this department should be sent to Mr. A. H. McKnight, M. K. & T. Ry. Building, Dallas.—Ed.

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### SOME SUGGESTIONS FOR AVOIDING DELAYS IN PRACTICE<sup>1</sup>

At the last meeting of this association I gained the thought which has afforded me my subject for this address. I saw there the earnest wish and feeling of every member of this Bar Association to try the new Practice Act to its fullest extent and purpose in order to speed up the award of justice. I hope and believe that experiment will accomplish the result so earnestly desired. I was in favor of it then, and I am in favor of it now, and it will, I am sure, remove one of the greatest obstacles we have to speedy trials. There are, however, four other matters which I want to discuss with you; and while I may have some difficulty in convincing all of you on some of them, I feel strongly myself that any of them, if adopted, would go far towards promoting that same great object.

The present attitude of laymen towards the members of our profession is extremely objectionable. The feeling is prevalent that lawyers and courts are necessary evils. I resent this accusation, but I am forced to admit that there are certain causes for it. The major cause is the *delay* invariably consequent upon a resort to the courts; and I am today going to ask this association to consider with me the eradication, if possible, of *this cause*. Business men of today do not permit delays in the dispatch of their business. The most successful of them never fail to keep their appointments, as, when and if they are made. They will not tolerate in us what they cannot abide in their associates; and I say to you that while the methods which I am going to suggest may take from some of us the weapons which we have effectively used, they will build for all of us a greater respect in the community, and, accordingly, afford a larger scope for the practice of our profession. As long as a resort to court entails endless delay and unnecessary expense, we may ex-

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<sup>1</sup>Address delivered before Dallas Bar Association, April 10, 1926.

pect to be avoided; but when we conduct our business with dispatch, the present sentiment that it is bad business to resort to court will be replaced by the feeling that it is good business to insist upon your rights.

To my mind, if allowed to continue, the delay in justice will inevitably tend to drive business further and further away from the law office. We all know that it has become more and more the duty of a good lawyer to counsel his clients before trouble arises; but no one, even the best of us, can forestall all litigation. And the irritation which the layman feels because of the personal inconvenience of delay, is not the only consequent for which our profession must answer. If and when we do bring the case to trial we are met with a cold lawsuit. By this I mean that witnesses are scattered, or have even disappeared; evidence is lost or destroyed; memories, once fresh on the subject, are dim; and we find ourselves with a weakened case, involving a stagnant matter. And yet, even these are not the sole considerations lying behind dissatisfaction caused by delays. Think of the economic waste perpetrated by dilatory tactics. Business makes its money by the turnover of its capital; and if its capital is tied up in a lawsuit, its operations must cease, at least to the extent involved in the lawsuit. And, again, I have seen a lawsuit in which the owner refused to accept a house built under contract by a contractor; and by the time the lawsuit was tried, the house was falling down through lack of attention. How many of the members of this audience have been able to try a contested case in Dallas County in less than one year after it has been filed? Very few of you, I venture to say, and the average delay is much greater, and getting greater year by year. Every year, for every lawsuit, from an economic standpoint at least, is a waste of the worst sort. How many times have you heard the business man say that he cannot afford to have a lawsuit. He does not mean he cannot afford to lose; he means he cannot stand the expense and delay contingent upon a lawsuit. If, accordingly, we eradicate the delay, we have met him half way with his objection.

In the first place, let me suggest to you the advisability of the larger use of the "Law of Arbitration."<sup>2</sup> Our original constitution of this state, in paragraph 13, of chapter 16, which contains the general provisions, devolved upon the legislature the duty to pass such laws as might be necessary and proper to decide differences by arbitration, when the parties shall elect that method of trial. In response to the duty thus imposed, the legislature, on April 25, 1846,

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<sup>2</sup>See Carrington, *Commercial Arbitration in Texas*, p. 450 this issue.



passed what is now known as "Title 7 of Chapter 1, Article 56, etc.," giving at length the proper procedure to obtain in cases where parties desired arbitration of their differences. This act has been but seldom used in our state. Arbitration is, of course, a difficult subject upon which to get parties to agree, after a dispute has arisen; and the statute which our legislature passed so long ago carried into it the common law of that time, which followed a decision of Lord Coke in *Bynior's Case*, in 1609, in which he declared that such contracts for arbitration *in futuro* could not oust the courts of jurisdiction. With this handicap, it is not difficult to understand the reason for the failure to use this method of settling disputes in our state; and while I do not wish to involve us in the controversy which raged during the sessions of the last meeting of the American Bar Association, I want to call your attention to the fact that years ago England abrogated this rule by an act of Parliament, and during the preceding year of 1925 Congress passed an act, effective the first day of this year, providing for agreements for arbitration of disputes *in futuro*, as well as *in praesenti*. Many states, including New York and Illinois, have also adopted this rule. But more significant than this is the further fact that almost every large trade association of the United States has attempted, by its own regulation, to enforce agreements among its members for arbitration of future, as well as of pending matters. And why, I ask you, is this true? Because business men of these United States have realized that it is only through such methods that they can accomplish the equal dispatch of their troubles and of their business. This matter of arbitration is a subject unto itself, and one upon which I would be pleased to address you at more length than my time will permit; but I shall confine my remarks to the general facts only, and leave this matter, with the final warning that if lawyers expect to gain the confidence and respect of business men, they must adapt their profession to the requirements of the business world.

But arbitration, even as great a factor as it will prove to be, has its limitations. Through years of practice it has been found an advisable procedure only in those matters of commercial law and of labor disputes. There are certain classes of actions in which it is not satisfactory, and in which a resort to courts has been found necessary. I refer to torts, trespasses, and innumerable actions outside of the classification of contract law. And in these actions all of the evils of delay are prevalent, with the possible exception of the economic waste. But the laymen blame our profession just as much in this class as in that class in which they have attempted to avoid

us by arbitration. There are, therefore, just as cogent reasons for a house cleaning here as there.

And this brings me to my first suggestion for eliminating delays in the trial of our cases, upon which, I am sure, not all of my listeners will concur, but about which I am more positive than the one which has preceded. I refer to the method and the terms under which continuances are granted in this state. I am sure it would be difficult to convince some men that continuances ought to be harder to get; but if lawyers will put their ears to the ground they will realize that every litigant whose claim is postponed, unless to him—not to us—good cause is shown, has a just ground for complaint against our profession. I had an illustration just a day or so ago. I had four parties interested in a case; I had gotten them to this city from out of town; and they were very anxious to dispose of the matter; but I had warned them of the possibility that although the case was to be called for trial, it might not be tried. On the day that it was set the attorney for one of the defendants made an oral application for continuance. I am sure that every ground he stated to the court was correct, and the application, being the first application, was, of course, granted. The proceedings were informal, and three out of the four of my clients sat in the back of the room, where they could not hear what transpired. One, however, came up close and heard the statements of court and counsel; and after that hearing, I venture to say, that I would have had considerable trouble in explaining to my clients why I did not strenuously insist upon a trial, if I had not been so fortunate as to have one client hear the proceedings. We are all too prone to that informal procedure. We seem to forget that lawsuits in which we appear as counsel are matters in which we merely act in a representative capacity. Where our clients want a lawsuit tried, we, as their representatives, should attempt to see that it is tried. What I would like to see would be a change of feeling which would alter that now existing, and by which attorneys representing the other side would not feel privileged to make it a personal matter between counsel whether or not a continuance should be granted. And I believe that the only method by which this can be accomplished is by a change of our law concerning continuances. I am not blaming the lawyers who apply for continuances—I do that myself—but I am blaming the law which permits it. My own suggestion would be that the law provide that every case must be tried on the day that it is called, unless it is continued for valid causes which the law itself sets out; and a failure to try the same, if on the part of the

plaintiff, will result in dismissal for want of prosecution; and if on the part of the defendant, a judgment through default. Under these circumstances, our client's convenience would be served, and our personal arrangements would, of necessity, conform. Our United States district judge for this (the Dallas) district, Judge Atwell, has adopted substantially this course, and I most heartily endorse it, *and all of us conform to it.*

But even if you may not agree with me in this drastic change, I do not think there can be any dispute about the fact that the law should be changed which makes it practically a reversible error to overrule the first application for a continuance. There can be no logical reason why the diligence required should not be just as great from the day the suit is filed as it is from the day the first application for continuance is granted.

And, again, the rule which requires the party resisting the application for a continuance to admit the *truth* of the statements which the absent witness would make, in order to obtain a trial of his case, is utterly ridiculous. That amounts, in effect, to saying that a party who has a witness absent, through whatever cause, would gain a greater advantage than if his witness were present. The rule should be that if the party is willing to admit that the witness, if present, would testify to such facts, then the result would be the same as if he were there; but any rule which gives an advantage because he is not there, is placing a premium upon the fact, which is ground for continuance. We see, day by day, the result of unwise laws, and there can be no argument that a law which invites delay and hinders dispatch of business, can but tend to bring our legal system into disrepute. If we were wise we would reverse the situation, and put the premium on the speedy justice.

In a general way I have attempted to bring home to you the two preceding suggestions for your consideration; and I am now brought face to face with another, which will require a more delicate treatment. I refer to the necessity of a system of choosing our judges, from the lowest to the highest, which would insure a caliber of men qualified with ability commensurate with the office which they seek. I do not mean to complain of the judges which we have, but rather to insure litigants that in the future judges of equally as high a caliber, if not higher, will sit upon the benches of our courts. My first thought in this matter relates to the method of choosing these men; and I am at once struck with the fact that, under our present system, the men seeking a judicial office must approach their goal through a political method. A political campaign must, of neces-



sity, be faced with a political turn of mind; and I can say, without fear or hesitation, that such a one is directly contrary to the judicial mind required of our judges. What is to keep the contests for election of judicial officers above the plane of, for instance, our coming gubernatorial campaign? What safeguard have we that candidates for the Supreme Court of our state will not indulge in the same character of personalities? They are elected under the same machinery, and they go through the same formulae, and, so far, only the difference of their position has acted as a check upon their tongues. I think I need not take up your time in argument that such a condition is apt to result in a situation which will be a disgrace upon the judiciary of our state. We have been saved only by the grace of God to this day, and I say to you that common sense ought to teach us that any safeguards which we can place against such a catastrophe should not be ignored.

And what can we do? This matter has been given great thought by the bar of this state and by the bars of other states. The trouble lies in the use of the primary for their nomination, and no positive betterment can be expected until we eliminate the nomination of judges by this purely political machinery. It might be unwise, however, to make the jumps too large, and we can do much to improve the situation now under the handicap of the primary methods. Those who are in constant contact with our courts and their officers, and from whose bodies the judiciary must necessarily be chosen, ought to exercise a larger voice in the nomination for these offices. I would not say that the right to nominate should be limited to the lawyers, but I do say that the lawyers should, from their more intimate association, advise the electorate, so that they may vote on this question with some semblance of knowledge of what they are doing. In our state, where there is but one party which predominates, this would be an easy matter; and I feel strongly that the general principle previously adopted by this association is, under present conditions, in essence, the correct one. I disagree with it in particulars, but I most earnestly urge that this association go on record as having put forth the candidates for judicial office for whom citizens of this jurisdiction may vote, and of lending their aid and support to acquaint the voters with their qualifications. What does the average voter of Dallas County know concerning the qualifications of any of the candidates for the Supreme Court of our state? None of them are from this jurisdiction; none of them have ever practiced law here; and, with the exception of the lawyers who come in contact with them, and certain personal friends, they must, of



necessity, be guided by either advice or ignorance. If, therefore, this association will discuss these possible candidates, and issue its majority opinion in the nature of advice to the voters of this county, they would be doing our electorate a great service, and a service which I feel, to some extent at least, is our duty as practicing members of our profession. We must eradicate this feeling which the layman harbors against a lawyer, and we can start in no better way than by placing all the judicial officers of this state upon a plane to which criticism cannot rise; and any method looking to that end should, and must, have your support.

I cannot leave this discussion, however, without saying that I feel that a ballot by mail of this association is not in harmony with the spirit which prompts the bar to give it endorsement. I think we ought to have a session at which will be present every member of the bar, or at least those who will show sufficient interest in an attempt to elevate their profession above the criticism directed against us; and in that meeting we should frankly and fully discuss all candidates for every judicial office which the voters of this particular association's jurisdiction may be called upon to know in the general election. It might be tedious to listen to some speakers throughout a long session; but the program could be shortened by the committee in charge by simply allowing a nominating and seconding speech, with a time limit, for every candidate who may have his name properly proposed before the convention.

And this brings me to the last suggestion, and that is that the judges which we have now, and those of which we ought to assure ourselves in the future, are entitled to a higher compensation. I believe that judicial office should carry with it high honor; but I do not believe that its small emoluments should prevent any practitioner from accepting, because of the sacrifice to himself and family. The salary should not be made so high that it will be attractive—the attraction should come solely from the honor of the office; but, on the other hand, it should not be so low as to permit the bare necessities of life only. As the cost of living rose, it has not left the expenses of the judges behind, unfortunately for them, but theirs mount up with those of other citizens of our country; and under the present-day salaries of our judicial officers in this state the acceptance of almost every single solitary judicial office would constitute a serious financial sacrifice to any man who had the ability to hold it, and is without means to supplement his salary.

I know, of course, that taxes are high; and I know, further, that any proposed increase in taxes is met with a storm of disapproval. A peculiar feature of humanity is a desire to be able to pay taxes,

and an intense distaste for paying them; but, fortunately, there is a method by which whatever increase in revenue will be needed to defray an increase in salary of our judges can be provided. For instance, in Dallas County alone last year there were filed very close to 8000 cases. If there were taxed as costs in every case an additional minimum fee of \$2.00, and, further, if such fee was graduated so as to increase with the increasing importance of the case, it would bring in from Dallas County alone much more than \$25,000. I do not wish to go into details of such plan, but simply assure you that the calculation has been made and the revenue can be supplied. And I want to call your attention to the fact that the burden will lie where it ought to lie; that is, on persons who use the services of the judges for whom the increased salaries are to be provided; it does not fall on the public generally; it falls upon the litigants, and not on the taxpayers, and is paid at last by the party who is adjudged to be wrong in the lawsuit; and I believe that under such an arrangement there could be but little complaint from that source.

I have taken up considerable of your time, and yet, as I look back upon it, I have discussed in but a general way, four most important subjects for your consideration; and I venture to say that about these, or kindred subjects, this association will find itself, in the not too distant future, faced with the necessity of action. We cannot keep our place as leaders in the thought of our communities, unless we strike down the specter which stalks every member of our profession; that specter is the hideous corpus of criticism; and if you could but rest your eyes upon its vital heart, you would find there written the word "*delay*."

*Joseph Weldon Bailey, Jr.*

Dallas.

# TEXAS LAW REVIEW

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CONTRIBUTORS OF LEADING ARTICLES IN THIS ISSUE.—Marshall Morgan is a member of the bar of Washington, D. C., and former chief counsel and assistant to the agent of the United States before the Mixed Claims Commission, United States and Germany.

Edson R. Sunderland is a professor of law in the University of Michigan. He is recognized as one of the country's foremost authorities upon procedure. He delivered a series of lectures upon procedural problems at the University of Texas Law School during March, 1926.

Paul Carrington is an attorney at Dallas, Texas.

John P. Bullington is a graduate of the University of Texas Law School of the class of 1925, and is a former editor of the *REVIEW*. He has been doing graduate work in France for the past year.

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BAR ASSOCIATION MEETING.—The joint meetings of the Bar Associations of Louisiana, Arkansas, and Texas were held in Texarkana,

April 22-24. It was doubtless the largest assembly of lawyers ever gathered together in the South. A notably brilliant series of addresses was delivered before the joint gathering. Among these were: "Liberty With Government," by Hon. Chester I. Long of Kansas, President of the American Bar Association; "What the Universities Should Do for the Legal Profession," by Wm. R. Vance, Professor of Law at Yale University Law School, formerly Dean of the Law School, University of Minnesota; "The Consanguineous Legal Systems of Arkansas, Louisiana, and Texas," by Hon. Henry P. Dart, Sr., of Louisiana; "The Progress and Development of the Law," by Hon. E. A. McCulloch, Chief Justice of the Supreme Court of Arkansas; "The Bill Authorizing the United States Supreme Court to Make Rules for the Trial of Actions in the United States District Court," by Hon. Thomas J. Walsh, United States Senator from Montana; "Woodrow Wilson and the League of Nations," by Hon. T. W. Gregory of Texas, formerly Attorney General of the United States; "The Development of the American Constitution Under John Marshall," by Hon. Albert J. Beveridge, formerly United States Senator from Indiana.

In the separate meetings of the Texas Association, interesting reports were made by Judge J. T. Montgomery for the Committee on Jurisprudence and Law Reform; Mr. W. E. Spell, for the Committee on Grievances and Discipline (proposing, *inter alia*, the organization of the bar of the state as a self-governing body); Dean I. P. Hildebrand, for the Committee on Legal Education and Admission to the Bar (recommending certain changes in the admission requirements looking to the requirement of more thorough preparation of applicants); Mr. D. A. Frank, for the Committee on Commercial Law; Mr. G. C. Gaines, for the Membership Committee (reporting a notable increase in membership); and Mr. W. A. Wright, for the Committee on Code of Ethics (advocating the adoption of the Code of Ethics of the American Bar Association). Many of these reports evoked spirited discussion, but all were adopted, as was also a resolution presented by Mr. Leon Green on behalf of certain members of the Austin Bar, which proposed the appointment of a special committee to prepare and further a plan for securing an increase in the salary of judges and an abandonment of the direct primary for their selection, a simplification of the system of pleading and practice, and constitutional changes permitting more flexibility in the organization of the courts. The following officers were elected: President, T. W. Davidson of Marshall; Vice-President, A. H. Britain of Wichita Falls; Secretary, George C. Gaines of Houston; Treasurer, H. G. Evans of Bonham; directors, W. M. Crook of Beaumont, Chairman, C. S. Bradley of Groesbeck, R. L. Ball of San Antonio, George E. Shelley of Austin, A. L. Burford of Texarkana.

The addresses and proceedings will appear in the annual Bar Association number of the TEXAS LAW REVIEW.

President A. H. McKnight and the other officers and directors



of the association, as well as the Texarkana Bar who acted as hosts, are to be congratulated upon this fruitful and successful meeting.

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THE RECENT WASHINGTON CONVENTION.—At the annual meeting of the American Law Institute held in Washington April 29 to May 1, four reports were considered in detail, criticized and debated. They were: Agency, restatement No. 1, covering definitions, distinctions, and the formation of the relation, 155 sections, Floyd R. Mechem, Reporter; Torts, restatement No. 2, upon the subject of privileges to commit intentional invasions of personality, 107 sections, Francis H. Bohlen, Reporter; Conflict of Laws, restatement No. 2, upon jurisdiction, 125 sections, Joseph H. Beale, Reporter, and Austin W. Scott, Associate Reporter; and Contracts, restatement No. 2, on the subjects of consideration, formation of formal contracts, and joint contractual obligations and rights, 129 sections, Samuel Williston, Reporter. The work upon the subject of criminal procedure is not yet completed.

It will be recalled that the regular course of business required that, previous to the meeting, each of the restatements, after being prepared by the reporter upon the basis of the decisions of the courts, be passed upon by the reporter's group of advisers, experts in the particular field, and by the Council, and revised pursuant to the changes there suggested. Having passed the approval of these bodies, a copy of each restatement was required to be sent to each member of the institute several weeks before the annual meeting and at that meeting the whole was gone over again by the entire membership, consisting of some 300 lawyers, judges and legal scholars.

The care and expertness with which this work is being done is without precedent in legal history.

George W. Wickersham presided, with the cooperation of the director, William Draper Lewis. On the first day of the meeting each of these ably set forth the work behind and ahead of the institute. The honorary president, Elihu Root, attended the convention. In responding to the ovation with which his arrival was greeted, he impressively rejoiced at the present awakening of the three branches of the profession to solidarity and reconstruction.

Kindred bodies met in Washington during the same week. The executive committee of the Association of American Law Schools ordered the program of the December convention at Chicago. The conference of Bar Association delegates to the American Bar Association, presided over by Charles E. Hughes, discussed and considered the advisability of establishing a self-governing bar in each state, as now existing in Alabama, New Mexico, and North Dakota, with particular reference to admissions to the profession and disbarments. The National Crime Commission received the reports of committee chairmen, and the assurance of cooperation in its work by such valuable agencies of propaganda as the motion picture industry, the American Legion, and the American Federation of Labor. F. Turbee Davisson presided. Prominent reports upon the subjects

of responsibility, education, procedure, and punishment were those of Frank O. Lowden, Mrs. Richard Derby, Herbert S. Hadley, and Newton D. Baker. A careful plan for a criminal survey in each state was recommended by the Commission, and steps were taken to give it the required publicity.

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AWARDS AND PRIZES IN THE LAW SCHOOL.—1. *The Montgomery Prize*: A prize of \$100, offered by Judge J. T. Montgomery of Wichita Falls, for the best comment by a student editor.

2. *The Mabel Hildebrand Prize*: A prize of \$50 offered by Mrs. Ira P. Hildebrand for the best recent case discussion by a student editor.

3. *The Mayo Prizes*: A prize of \$100 offered by Mr. R. W. Mayo of Dallas, for the best article by a law student on the subject, "What Power Have Parties to an Insurance Agreement to Alter or Waive Terms Prescribed Either by Legislative or Administrative Bodies?"

A prize of \$50 for the best article by a law student on the subject, "The Duty of the Lawyer as a Diplomat Between Contending Litigants."

4. *The Vernon Law Book Prize*: A set of Vernon's Annotated Texas Statutes to the student who has made the greatest contribution, considering both quality and amount, to the REVIEW.

The awards will be made in the near future.

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APPEAL AND ERROR—WHEN IS A MOTION FOR NEW TRIAL NECESSARY AND WHAT ERRORS NEED BE ASSIGNED IN SUCH MOTION?—No current local procedural problem has caused more confusion or more conflicting decisions than has the question of the necessity of filing a motion for new trial and of assigning errors therein. It will be difficult to find any point of law upon which the Texas Courts of Civil Appeals have so consistently held contrary to what seems to be the views of the Supreme Court as set out in former decisions and as interpreted in the recent case of *Phillips Petroleum Co. v. Booles*,<sup>1</sup> decided by the Commission of Appeals.

The confusion has arisen chiefly in the construction and application of Rules 24 and 25 for the Courts of Civil Appeals as amended January 24, 1912,<sup>2</sup> and of Rule 71a<sup>3</sup> for the district and county courts, adopted on the same date. Prior to that time the rules of practice were settled and uniformly followed; no statute, no rule, and no decision of the Supreme Court is to be found requiring a motion for new trial as prerequisite to appellate review, although it had been the long established practice in cases tried before a jury

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<sup>1</sup>276 S. W. 667 (Tex. Comm. of App., 1925).

<sup>2</sup>142 S. W. xii.

<sup>3</sup>145 S. W. vii.

to file such a motion. Only errors committed on the trial, which the trial court had not had an opportunity to pass on were required by this practice to be presented in a motion for new trial. When the errors relied upon as a ground for reversal related to any *ruling* of the trial court, appeal might be had upon assignment of error alone. As so often stated by the courts: "The trial judge having once acted, it is not to be presumed that he will change his ruling and hence in order to appeal from such action it is not necessary that it be made ground for new trial; but it is always proper to do so."<sup>4</sup> On the other hand, where the error relied on was *not* a *ruling* of the court it was necessary that the court have an opportunity to pass upon it. Based upon this reasoning the courts have consistently held that no judgment can be reversed on the ground of insufficiency of the evidence to support the verdict until such ground is presented to the trial court in a motion for new trial. This rule was first announced in *Foster v. Smith*.<sup>5</sup> It was clearly stated again in *Clark v. Pearce*<sup>6</sup> as follows:

This court can properly reverse only for error in the rulings of the lower court and however contrary to the evidence a verdict may be if responsive to the issues and in proper form the trial court has no discretion, but is bound to enter judgment upon it. Therefore it would seem to follow that before it can be claimed that there is error in the ruling of the court upon the sufficiency of the evidence to support the finding of the jury, the action of the court upon the matter should be invoked by a motion for new trial which states specifically the grounds for which the verdict is sought to be annulled.

The obvious necessity for this holding is the Texas rule that the trial judge cannot direct a verdict in favor of one party where the evidence presents an issue, even though he would be compelled to grant a new trial because of the insufficiency of the evidence to support a verdict should it be rendered against such party.<sup>7</sup> But if the assignment is that there is *no* evidence to support the verdict, this need not be made in a motion for new trial as it raises a question which obviously the trial court must have passed on when it submitted the issue to the jury.

The same general principle supports the holding that errors in overruling or sustaining exceptions to pleadings, admitting or rejecting evidence over objections, and in refusing, giving, or qualifying charges are actions of the court itself and may be appealed from without motion for new trial.<sup>8</sup> Likewise the rule was early announced and consistently followed that no motion for new trial

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<sup>4</sup>Clark v. Pearce, 80 Tex. 146, 15 S. W. 787 (1891).

<sup>5</sup>1 Tex. 70 (1847).

<sup>6</sup>*Supra*, note 4.

<sup>7</sup>Choate v. S. A. & A. P. Ry., 91 Tex. 406, 44 S. W. 69 (1898).

<sup>8</sup>W. U. Telegraph Co. v. Mitchell, 89 Tex. 441, 35 S. W. 4 (1896).



is necessary in cases tried before the court without a jury.<sup>9</sup> Here it is to be seen that whatever errors have been committed were errors of the court. Also where the case was tried on special issues, and the verdict did not support the judgment, it was held that a motion for new trial was not necessary. This rule was incorporated into a statute by the acts of 1895<sup>10</sup> and is still retained in the REVISED STATUTES OF 1925.<sup>11</sup> It is suggested, however, that even in cases tried on special issues, where the ground for reversal is misconduct of the jury, newly discovered evidence, or other matter which has not been submitted to the trial judge, then such ground must first be presented by motion for new trial. And only after the court has passed upon the point in ruling upon the motion can its action be assigned as error.

In all cases, however, under old Rule 24 for the Courts of Civil Appeals, regardless of whether a motion for new trial was filed, all errors, not fundamental, were required to be set forth in formal assignments of error.

The foregoing is sufficient to disclose the practice prior to 1912, when Rule 24 was amended to read: "*The assignment of error must distinctly specify the grounds of error relied on, and distinctly set forth in motion for new trial in the cause, and a ground of error not distinctly set forth in a motion for new trial in the cause and not distinctly specified in reference to that which is shown in the record, or not specified at all shall be considered as waived unless it be so fundamental that the court would act upon it without an assignment of error as mentioned in Rule 23.*" The words in italics were added by the amendment and the omission of them in reading will give the rule as it formerly was. At the same time Rule 71a for district and county courts was adopted, which reads as follows:

A motion for new trial shall be filed in all cases where the parties desire to appeal from a judgment of the trial court or sue out a writ of error in the cause unless the error complained of is fundamental except in such cases as the statute does not require a motion for new trial.

To discuss or even cite the inconsistent holdings which have risen in the construction of these rules is not permissible here. In *Nunn v. Veale*,<sup>12</sup> a Court of Civil Appeals stated shortly after their adoption that under these rules a motion for new trial was necessary in all cases whether tried before the court or a jury, and whether on special or general issues. In *Stewart v. McAllister*,<sup>13</sup> a case tried on special issues, the court said: "No motion for new trial was made and presented in the trial court and consequently there can be no assignments of error except those based on fundamental error, and

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<sup>9</sup>Alexander v. Bell, 22 Tex. 350 (1858); Greer v. Featherstone, 95 Tex. 654, 69 S. W. 69 (1902); Craver v. Greer, 107 Tex. 356, 179 S. W. 862 (1915).

<sup>10</sup>Art. 1333 of Acts of 1895; Arts. 1990 and 1991 of REV. CIV. STAT. 1911.

<sup>11</sup>Arts. 2209 and 2210.

<sup>12</sup>149 S. W. 758 (Tex. Civ. App., 1912).

<sup>13</sup>209 S. W. 704 (Tex. Civ. App., 1919).



unless plaintiff can show that fundamental error was made, he has no standing in an appellate court."

It had previously been held that Article 1333<sup>14</sup> expressly provided that a motion for new trial was not necessary in cases tried either before the court or on special issues. Thus the Courts of Civil Appeals were construing and enforcing Rules 24 and 25, in direct contravention of the statutes as interpreted by the Supreme Court, in spite of the fact as stated in *Craver v. Greer*<sup>15</sup> that the Supreme Court is by the constitution denied the authority to establish a rule of procedure which is inconsistent with a statute. Another Court of Civil Appeals in *Land and Irrigation Co. v. Mercedes P. Co.*<sup>16</sup> in referring to the *Nunn Case*, attempted to explain the holding under Rules 24 and 25, and the failure to cite Rule 71a on the ground that at the time the opinion was written Rule 71a, as originally adopted, did not contain the clause, "except in such cases as the statute does not require a motion for new trial," although this clause merely expressed a limitation which was applicable to the rule from its promulgation.

Another point upon which there has been considerable variance in the decisions under the new rules is the question of the necessity of the motion for new trial where the error complained of is the giving, refusal, or qualification of charges to the jury. The Supreme Court in *M. K. & T. Ry. Co. v. Beasley*,<sup>17</sup> held that Articles 2061 and 2062<sup>18</sup> expressly provided that these errors need not be raised in a motion for new trial, and hence that Rules 24 and 25 could not be given the effect to require them to be raised in such motion. In support of this construction of these articles the court cited *W. U. Telegraph Co. v. Mitchell*.<sup>19</sup> A careful reading of that case, however, reveals the fact that the court there did not so construe these articles nor was it necessary for it to do so. The case was decided upon the general principles applicable to motions for new trial and not upon these particular statutes, although they were referred to. In fact, as stated by a Court of Civil Appeals in *El Paso Elec. Ry. v. Lee*,<sup>20</sup> these articles merely relate to and dispense with the necessity of taking formal bills of exceptions to the rulings of the court in regard to instructions to the jury. They in nowise undertake to specify whether a motion for new trial shall be filed as a prerequisite to the right of appeal. For this reason and also because it regarded the statements in the *Beasley Case* as dicta, the Court of Civil Appeals in the case last cited refused to follow that holding of the Supreme Court. Nevertheless most of the later cases have followed

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<sup>14</sup>*Supra*, notes 11 and 12.

<sup>15</sup>*Supra*, note 10.

<sup>16</sup>155 S. W. 286, 292 (Tex. Civ. App., 1913).

<sup>17</sup>106 Tex. 160, 155 S. W. 183 (1913).

<sup>18</sup>Art. 2237, Pars. 3 and 4.

<sup>19</sup>*Supra*, note 10.

<sup>20</sup>157 S. W. 748 (Tex. Civ. App., 1913).

the *Beasley Case*.<sup>21</sup> If this is the better view it is so not because it is based on a more accurate interpretation of the rules and the statutes, but because common sense would dictate that a party may appeal from an action of the trial court without resubmitting the same matter to it for a repetition of the error.

The article of the statutes which has occasioned the most confusion is Article 1612,<sup>22</sup> passed in 1913. This article provides:

Before he takes the transcript from the clerk's office, the appellant or plaintiff in error shall file with the clerk of the court below all assignments of error, distinctly specifying the grounds on which he relies. Where a motion for new trial has been filed, the assignments therein shall constitute the assignments of error. All errors not distinctly specified are waived, but an assignment shall be sufficient which directs the attention of the court to the error complained of.

Rule 101a for the district and county courts was adopted by the court with the same language and as said in *Hess & Skinner v. Turney*,<sup>23</sup> will be given the same interpretation. The Courts of Civil Appeals held this statute to be mandatory in its requirement that in cases in which a motion for new trial is filed, all assignments of error must be embodied in the motion and that those not so included cannot be considered by the appellate court.<sup>24</sup> The Supreme Court, however, held in the *Hess Case* that the legislature did not intend by this article to confine an appellant for his assignments of error to those in his motion for new trial but intended to permit him so to use his motion without further assignments of error if he desired. Many of the Civil Appeals cases referred to above were decided before and many after the opinion in the *Hess Case* was written.

The following language from this case is frequently quoted:

In cases where a motion for new trial is required to be filed, errors complained of in assignments of error which are required to be set forth in a motion for new trial and are not there set forth will be considered as waived under Rule 24. . . . In this case the trial having been before the court without a jury the appellant was entitled to appeal without filing a motion for new trial.

This statement is of little help. It left open the big problem before us: When is a motion for new trial required? And what are the errors which are required to be set forth in such motion? In a well considered opinion by the El Paso Court of Civil Appeals<sup>25</sup>

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<sup>21</sup>Cf. *Houston Oil Co. v. Drumwright*, 162 S. W. 101 (Tex. Civ. App., 1914).

<sup>22</sup>Art. 1844, REV. CIV. STAT., 1925.

<sup>23</sup>109 Tex. 208, 203 S. W. 593 (1918).

<sup>24</sup>A few of the many Civil Appeals cases which have so held are: *Dees v. Thompson*, 166 S. W. 56 (1914); *Edwards v. Youngblood*, 160 S. W. 288 (1913); *Harden v. Hanson*, 220 S. W. 368 (1920); *Occidental Life Ins. Co. v. Montgomery*, 226 S. W. 750 (1920).

<sup>25</sup>*Ry. v. Lee*, *supra*, note 20.

it was held that under the rules above discussed a motion for new trial was required in all cases except where the statutes expressly provided otherwise. It was there said that the sole and obvious purpose of the amendments to Rules 24 and 25, and of the adoption of Rule 71a was to effect this requirement. The court further stated that at a conference of the Justices of the Supreme Court and of the Courts of Civil Appeals, a few months before January, 1912, this very problem was discussed and the judges there agreed upon these rules with the end in view of requiring uniformly that all errors be called to the attention of the trial court in a motion for new trial.

But if such was the object of these rules, it has not been attained. The *Beasley Case* established the qualification that errors in giving and refusing charges need not be assigned in a motion. In the *Craver Case* the court seemed to indicate that the only exception was in the case of a trial before the court, under Articles 1990 and 1991. But as pointed out in *Varley v. Nichols Shepard Sales Co.*,<sup>26</sup> these articles are equally applicable to trials before a jury on special issues. In the *Hess Case*, tried before the court, it was said that under Article 1612 the appellant could present his assignments of error in a motion for new trial or by formal assignments of error as he chose. The broad language of the court would lead one to believe that cases where a motion had to be filed were the exceptions and not the rule, and that ordinarily the appellant might choose to rely either on motion for new trial or assignments set up independently. The *Beasley Case* was decided on the authority of the case of *W. U. Telegraph Co. v. Mitchell*. The *Mitchell Case* had been decided on the basis of the general practices followed before the new rules took effect. The *Beasley Case* purported to be governed by the new rules, but it did not refer to Rule 71a. The courts continue to decide cases on the authority of these two, without mentioning Rule 71a, whereas if properly considered it would be seen that this rule is really in conflict with the doctrine of these cases. It remained, however, for the recent case of *Phillips Petroleum Co. v. Booles* to take the full step back to the position which the courts had adopted before the new rules took effect and to hold that a motion was necessary only to present to the trial court errors not before passed upon by it. The same result had been reached by a Court of Civil Appeals in a single case, *Western Union Telegraph Co. v. Waller*,<sup>27</sup> but the court gave only the briefest discussion of the question and cited no authority for its conclusion, except the cases herein reviewed. The only change from the older line of cases, recognized in the *Booles Case*, was that effected by Article 1612 (Art. 1844, REV. CIV. STAT. 1925), permitting the assignments in a motion for new trial to take the place of and render unnecessary formal assignments of error. The court held that the distinction attempted to be drawn between

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<sup>26</sup>191 S. W. 611 (Tex. Civ. App., 1917).

<sup>27</sup>233 S. W. 1026 (Tex. Civ. App., 1921).



jury and non-jury trials was without foundation, and as a complete summary of guiding principles laid down the following conclusions:

(a) In any case where a motion for new trial is filed it may or may not at the option of the appellant constitute the assignment of errors relied upon for reversal. (b) In any case whether tried by the court or before the jury either upon a general charge or upon special issues, the appellant may present errors to the appellate court, either through a motion for new trial filed below or by other assignments duly filed in the trial court. (c) Where other assignments are filed they may supplement or even displace the grounds set forth in the motion for new trial. They need not be copies of such grounds nor even substantially the same, but may be entirely distinct and different therefrom. (d) In no case, however, will an error (not fundamental) as to a matter not called to the attention and ruling of the trial court, either in the course of the trial, or through the offices of a motion for new trial be ground for reversal in the appellate court. (e) A commendable practice in this respect is to file in all cases a motion for new trial presenting those points which have arisen to the time and thereafter to file in the trial court supplemental assignments of error presenting only those matters not covered by the motion, thus availing the appellant and the courts of the benefits of the amended Article 1612.

The Supreme Court adopted the judgment but did not approve the opinion of the Commission. Viewed from the standpoint of simplicity and convenience these rules of practice commend themselves and are worthy of approval by the Supreme Court. The case, however, ignores Rule 71a for the district and county courts. The court made the rule, and it may likewise disregard it. In its reasoning the opinion is supported by the previous decisions of the Supreme Court; but its weight as authority, in view of the failure of the Supreme Court to approve the holding, is uncertain, except that the case having been tried before a jury and the assignments of error not having been presented in the motion for new trial, its very decision fills the only gap left open in the chain of cases marking the return on the essential point to the former practice. The opinion is so clear and comprehensive that it should be accepted as concluding the thirteen-year argument on the point.

*Sterling C. Holloway.*

COMMUNITY PROPERTY RIGHTS OF MARRIED WOMEN.—In the case of *Millsap v. Peoples*,<sup>1</sup> recently decided by the Texas Court of Civil Appeals, the plaintiff brought suit in trespass to try title showing that he deraigned title through an execution sale under a personal judgment against Mrs. Lockley after she became the community survivor and administratrix of the land in question. Five of the eight children had conveyed their interest to their mother. The defendant predicated his claim on a deed from Mrs. Lockley given to him subsequent to the execution sale. The court followed

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<sup>1</sup>279 S. W. 870 (Tex. Civ. App., 1925).



the decision of *Brown v. Adams*<sup>2</sup> and held that the plaintiff at the execution sale acquired only thirteen-sixteenths interest in the land, because, in the absence of pleading and proof that the debt was a community obligation, a judgment against the surviving wife would be binding only on her interest in the estate. The court recognized that the wife had a separate one-half interest in the estate after the death of the other spouse. By the conveyance of the children, she received five-sixteenths more of the estate and thereby had the interest that the court held to have passed in the execution of the judgment against the wife.

After all the community debts have been settled, it is well established that the wife has one-half ownership in the community property upon the dissolution of the marriage.<sup>3</sup> The Texas courts have unequivocally stated that the wife is one-half owner and co-partner in the community property even during the coverture.

Judge Phillips, C. J., in *Burnham v. Hardy Oil Co.*,<sup>4</sup> expressed the opinion of the court as follows:

In this State the beneficial interest of the husband and wife in community property are equal, whether the grant or deed to the property be in the name of only one of them or to them jointly. Though the grant or deed be in the name of the husband alone the "interest" or "estate" of the wife in the property is as absolute as that of the husband. She acquires her interest in virtue of our law governing community property, and the force which that law imparts to a conveyance of the property to the husband during the marriage. She takes under a grant or deed in his name to the same extent that he does; and it is as fully through the grant as is true of his interest, that she is invested with her right.

In *Lee v. Lee*,<sup>5</sup> the court said:

The first right is that of each of the spouses to their separate property, and the second is as to the community property belonging to both, in which their rights are *unified and are equal*. (Italics mine.)

Are such contentions sound? Does the wife have the equal one-half ownership as expressed by the courts? It is suggested that probably the court failed to analyze the rights of each spouse.

Bouvier<sup>6</sup> defines ownership as:

The right by which a thing belongs to someone in particular to the exclusion of all others. The entirety of use and disposal allowed by law. It implies that there is some power of disposal, but the owner of a thing is not necessarily the person who at a time has the whole power of disposal.

<sup>2</sup>55 S. W. 761 (Tex. Civ. App., 1900).

<sup>3</sup>Arts. 4620, 4621, REV. CIV. STAT., 1925; *Moore v. Wooten*, 265 S. W. 210 (Tex. Civ. App., 1925).

<sup>4</sup>108 Tex. 555, 195 S. W. 1139, 1143 (1917).

<sup>5</sup>112 Tex. 392, 247 S. W. 828 (1923).

<sup>6</sup>LAW DICTIONARY, 565.

Words and Phrases defines ownership as follows:

Ownership is the right by which a thing belongs to an individual, to the exclusion of all others.

Dean Townes<sup>7</sup> has defined ownership in this manner:

We may, therefore define general ownership of a thing as; the right to exclusive dominion over it and to the possession, use and enjoyment of it, subject in its use and disposition of it as reserved in the Constitution and law.

It is well here to note Hohfeld's<sup>8</sup> hypothetical example of ownership:

Suppose, for example, that A is fee-simple owner of Blackacre. His "legal interest" or "property" relating to the tangible object that we call *land* consists of a complex aggregate of rights (or claims), privileges, powers, and immunities.

First, A has multital legal rights, or claims, that *others*, respectively, shall *not* enter on the land, that they shall not cause physical harm to the land, etc., such others being under respective correlative legal duties. Second, A has an indefinite number of legal privileges of entering on the land, using the land, harming the land, etc., that is, within limits fixed, by law on the grounds of social and economic policy, he has privileges of doing on or to the land what he pleases; and correlative to all such legal privileges are the respective legal no-rights of others persons. Third, A has the legal power to alienate his legal interest to another, i. e., to extinguish his complex aggregate of jural relations and create a new and similar aggregate in the other person; also the legal power to create a life estate in another and concurrently to create a reversion in himself; also the legal power to create a privilege of entrance in any other person by giving "leave and license"; and so on indefinitely. Correlative to all such legal powers are the legal liabilities in other persons—this meaning that the latter are subject *volens volens* to the changes of jural relations involved in the exercise of A's powers. Fourth, A has an indefinite number of legal immunities, using the term immunity in the very specific sense of non-liability or non-subjection to a power on the part of another person. Thus A has the immunity that no ordinary person can alienate A's legal interest or aggregate of jural relations to another person; the immunity that no ordinary person can extinguish A's own privileges of using the land; the immunity that no ordinary person can extinguish A's right that another person X shall not enter on the land or, in other words, create in X a privilege of entering on the land. Correlative to all these immunities are the respective legal disabilities of other persons in general.

The criterion of ownership is primarily the right of control. The only right of control that the wife has in the community property,

<sup>7</sup>AMERICAN ELEMENTARY LAW, pp. 184, 186.

<sup>8</sup>See HOHFELD, FUNDAMENTAL LEGAL CONCEPTIONS, 96; 26 YALE L. JOUR. 710, 746; also 23 YALE L. JOUR. 16, 21, 24, 59.

in the light of the statutes,<sup>9</sup> is to subject the community property for debts arising out of her contracts in furnishing herself and children with necessaries. Aside from this right of the wife, the husband is given full control of the community estate, and only in case of a fraudulent conveyance can she object.<sup>10</sup> In *Rowlett v. Mitchell*,<sup>11</sup> the court held that the husband, in absence of a showing of fraud or disability,—as lunacy, could dispose of the community property in any manner he saw fit. The court even said that he could expend the joint estate in "riotous living" or give it away if he felt so disposed, and yet the wife could not be heard to complain. It is only when he disposes of the estate for the purpose of defrauding her that she can obtain relief. Clearly the wife has no legal title, for her joinder in a conveyance of lands is non-essential. Neither does she have equitable title for a purchaser with knowledge of her disapproval of the conveyance by the husband is not affected by her dissent. It might be contended that the wife has a right of control in that she can subject<sup>12</sup> the community property for payment of her debts contracted for necessaries for herself and children. Certainly such a contention is not well founded, for this right of control is not indicia of ownership. The wife has the same right of subjecting the separate estate of the husband<sup>13</sup> in absence of a community property. It could hardly be maintained that the wife has any ownership in his separate estate because of this right of control. The law considers the husband as the provider for the family, and the wife is merely given the right to subject his property to the obligations due her and their children. The subjecting of the community fund for debts of this sort can really be said to be indicia of ownership in the husband in that he can fill his personal obliga-

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\*Art. 4619, REV. CIV. STAT.:

All property acquired by either the husband or wife during the marriage, except that which is the separate property of either, shall be deemed the common property of the husband and wife, and during coverture may be disposed of by the husband only.

Art. 4621, REV. CIV. STAT.:

The community property of the husband and wife shall not be liable for debts or damages resulting from contracts of the wife except for necessaries furnished herself and children, unless the husband joins in the execution of the contract.

<sup>10</sup>*Jones v. Jones*, 146 S. W. 265 (Tex. Civ. App., 1912); Art. 4635, REV. CIV. STAT., 1925:

At any time during a suit for divorce the wife may for the preservation of her rights, require an inventory and appraisement to be made of both real and personal estate which are in the possession of the husband, and an injunction restraining him from disposing of any part thereof in any manner. (This statute is clearly to prevent a fraudulent conveyance by the husband.)

<sup>11</sup>52 Tex. Civ. App. 589, 114 S. W. 846 (1908).

<sup>12</sup>Note 9, *supra*.

<sup>13</sup>Art. 4613, REV. CIV. STAT., 1925.

tions out of the community estate to the benefit of his separate estate. As a practical matter the husband has never made a difference in his separate estate and the community property in the making of his contracts or in the settlement of his debts. The best proof of this is evidenced by the fact that since the community property statutes were enacted in 1848, no question has ever arisen in which the court had to decide the question as to whether the creditor could subject the separate property of the husband for the satisfaction of community obligations.<sup>14</sup>

Where the husband abandons the wife, she gets control of the community estate if by his abandonment he has reduced her to necessity in providing for herself and children.<sup>15</sup> Conveyances in order to defraud the wife or an abandonment by the husband are not the ordinary occurrences of the marital relationship and are only different in degree from the final dissolution of the coverture. It is only when the marital relationship begins to dissolve that the elements of ownership creep into the wife's interest and finally culminate into full ownership upon the dissolution of the marriage. The wife's interest during the normal coverture is clearly not an ownership of one-half as declared by our courts, but merely a contingent right that vests into ownership upon the dissolution of the marriage.

It should be noted that Article 4616<sup>16</sup> provides as follows:

Neither the separate property of the wife, nor the rents from the wife's separate real estate, nor dividends on stocks owned by her, nor her personal earnings, shall be subject to the payment of debts contracted by the husband nor the torts of the husband.

Article 4623<sup>17</sup> provides:

Neither the separate property of the husband nor the community property other than the personal earnings of the wife, and the income, rents and revenues from her separate property, shall be subject to the payment of debts contracted by the wife, except those contracted for necessities furnished her or her children.

These two statutes indubitably give the wife the right of control of the portion of the community property derived from the personal earnings, rents, interest on bonds, and notes, dividends on stocks owned by her, and the husband is without power to reach it. Her

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<sup>14</sup>In *Leatherwood v. Arnold*, 66 Tex. 414 (1886), the Supreme Court by way of dictum said: "The surviving husband is personally liable for community debts. If he has extinguished the community interest in a given item of community property it is still subject to community debts *because the community debt is also his individual liability.*"

<sup>15</sup>*Lansater v. Jameson*, 203 S. W. 1151 (Tex. Civ. App., 1918).

<sup>16</sup>REV. CIV. STAT., 1925.

<sup>17</sup>REV. CIV. STAT., 1925.



right of using this class of community property has been recognized to the extent of her contractual powers,<sup>18</sup> and she can truly be called the owner of this portion of the community property, subject to the contingent ownership that vests in the husband when the dissolution of the coverture occurs. Aside from this special class of community property, the logical conclusion is that the husband is the full owner of the community property during the marriage.

*Emanuel Reichman.*

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CRIMINAL LAW—CRIMINAL RESPONSIBILITY IN TEXAS FOR THE DEATH OF A PERSON CAUSED BY ONE WHO IS DRIVING A CAR WHILE UNDER THE INFLUENCE OF INTOXICATING LIQUOR.—Recently there appeared in a leading Texas newspaper an account of the death of a pedestrian caused by his being run over by an automobile which was being driven at the time by a person who, it was alleged, was intoxicated. It was said that the driver was indicted under Article 802 of the Penal Code of 1925, for driving a car while intoxicated, and that he could not be indicted under Title 15, Chapter 14, of the Penal Code of 1925, for negligent homicide. This raised the question in the writer's mind as to whether there is any criminal responsibility in Texas for *homicide* which results from a collision caused by an intoxicated driver of an automobile or other motor vehicle. The writer is not familiar with the facts in the case reported by the newspaper—it serving merely to raise the question mentioned above—and it is understood that none of the remarks here made are directed toward that case.

It is conceived that a homicide might occur under any of the following enumerated circumstances: (1) the driver drives the car while so drunk that he does not know what he is doing, (a) intending at the time he gets drunk to drive the car while intoxicated; or (b) beginning to drink after he starts driving the car; or (c) having no intention at the time he gets drunk to drive the car but in fact doing so after he becomes drunk. (2) He drives the car while *slightly* under influence of liquor, and (2) willfully kills another; or (b) negligently kills another.

Upon an examination of the Penal Code provisions as to homicide, it will be found that homicide by negligence is of two kinds,—first, such as happens in the performance of a lawful act, and second, such as happens in the performance of an unlawful act. By an unlawful act is meant such act as by the Penal Code is called a misdemeanor, and such act, not being a penal offense, as would give just occasion for a civil action. It is quite apparent that if a homicide happens in the commission of an act which under the Penal Code is a felony, a person doing such act would not be guilty of negligent homicide under

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<sup>18</sup>See Bobbitt: "Community Property in Texas," 4 TEXAS LAW REVIEW 154; also see Whitney Hardware Co. v. McMahan, 111 Tex. 242, 231 S. W. 694 (1921); Cauble v. Beaver-Electra Refining Co., 274 S. W. 120 (Tex. Sup. Ct., 1925); Gohlman, Lester & Co. v. Whittle, 114 Tex. 548, 273 S. W. 808 (1925).

the Texas statute. Now one may be confined in the penitentiary for two years for driving a car while intoxicated. Article 47 of the Penal Code provides that if an offense may be punishable by death or confinement in the penitentiary it is a felony, otherwise a misdemeanor. No further argument need be adduced to warrant the conclusion that one who kills another while driving in an intoxicated condition, or in some degree under the influence of intoxicating liquor, cannot be convicted of *negligent* homicide.

In 1917 the legislature passed an act which is now Article 1149 of the Penal Code which provides that when the driver of a motor vehicle willfully or with negligence, as is defined in the chapter on negligent homicide, collides with a person causing injuries resulting in death, he shall be dealt with under the general law of homicide. Unless Article 36 of the Penal Code making intoxication no excuse for the commission of crime<sup>1</sup> was modified by the legislature in 1923 when it passed the act which is now Article 802 of the Penal Code (the article mentioned in the newspaper account above referred to) there would seem to be no objection to prosecuting a drunken driver under Article 1149—that is, under the general law of homicide.

Article 42 of the Penal Code reads as follows: "One *intending* to commit a felony and who in the act of preparing for or executing same shall through mistake or accident do another act, which, if voluntarily done, would be a felony, shall receive the punishment affixed to the felony actually committed."

Considering the situations enumerated above in the order in which they are enumerated, what is the liability of the driver in situation 1—(a)? It would seem clear that he would fall within the provisions of Article 42 of the Penal Code quoted above and be guilty of murder.

In situation 1—(b)? It would seem that Article 36 of the Penal Code would prevent him from showing that he did not intend to commit a felony and again Article 42 would be applied to hold him guilty of murder.<sup>2</sup>

In situation 1—(c)? This is the situation in which it is most difficult to impose liability. It would be less shocking to the public conscience to allow the driver to go unpunished in this situation than in any of the other situations enumerated. But there may be a theory upon which criminal responsibility may be attached to the driver even in this situation. It may be that Article 36 can again be summoned to help the prosecution out of its legal difficulty by prohibiting the driver from setting up the defense of intoxication. However, it might very reasonably be contended that this reasoning would produce an inconsistency in that the prosecution must prove as an essential element of the offense the fact of the defendant's drunkenness, while the defendant, on the other hand, could not rely upon the fact

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<sup>1</sup>Evers v. State, 31 Tex. Crim. App. 318, 20 S. W. 744 (1892).

<sup>2</sup>It must be borne in mind that it is not necessary to prove that the driver intended to drive while intoxicated in order to sustain a conviction under Article 802.

that he was drunk to rebut the evidence that he intended to commit the felony of driving a car while intoxicated. This would certainly present a problem to the trial judge as to how he should instruct the jury. There would be no legal difficulty in imposing liability if Article 42 of the Penal Code should be made to read as follows: "One *while in the commission of a felony* or intending to commit a felony and who in the act of preparing for or executing the same shall through mistake or accident do another act which, if voluntarily done, would be a felony, shall receive the punishment affixed to the felony actually committed."<sup>3</sup>

In situation 2—(a)? It would be an imposition upon the intelligence of the reader to explain why the driver would be guilty of murder in this situation.

In situation 2—(b)? On first impression there is here an apparent difficulty in imposing liability since the driver cannot be convicted of negligent homicide, the offence being, as already explained, a felony and hence not a predicate for negligent homicide.<sup>4</sup> But this apparent difficulty disappears when Article 42, which makes the offender guilty of "the felony actually committed," is recalled. The defendant would be guilty of murder.

For the reasons outlined above the writer believes that there is criminal responsibility in Texas for the death of a person caused by one who is driving a car while intoxicated with the possible exception of a case where the driver at the time he becomes intoxicated has no intention to drive the car and is so drunk when he drives the car that he does not know what he is doing. In the forum of the public conscience a man who kills another by colliding with him willfully or negligently is doubtless just as guilty if he is drunk at the time the act is committed as he would be if he were not drunk, and, if it is possible to convict him under the existing law, he should be convicted and punished for the homicide. The question is a purely legal one; probably no jury would hesitate to convict such a man if he should be brought before it.

*Robert B. Holland.*

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EVIDENCE—ADMISSIBILITY OF STATEMENTS AND ACTS OF ACCUSED WHILE UNDER ARREST.—Whether or not the bare fact that the accused was under arrest at the time of making a confession is sufficient to render such confession inadmissible in evidence in the absence of proof that he was duly cautioned as to the effect of making a confession, is a question that has been definitely settled, in Texas, by

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<sup>3</sup>The words in italics are those added by the writer. It is submitted that they do not limit the application of Article 42 but extend it to cover the present situation.

<sup>4</sup>It might be well to note in this connection that it has been held that the mere fact that whisky may be smelled upon the breath of the driver will not support a conviction of Article 802, *Chairez v. State*, 265 S. W. 905 (1924); if that is all the evidence that the prosecution has it would very likely be proper to indict for negligent homicide.



statute.<sup>1</sup> That an unwarned confession, made while under arrest, is inadmissible, is apparent from the language of the statute, the provisions of which, material to this discussion, are as follows:

Art. 727. The confession shall not be used if, at the time it was made, the defendant was in jail or other place of confinement, nor while he is in the custody of an officer, unless made in the voluntary statement of accused, taken before an examining court in accordance with law, or be made in writing and signed by him; which written statement shall show that he has been warned by the person to whom the same is made: First, that he does not have to make any statement at all. Second, that any statement made may be used in evidence against him on his trial for the offense concerning which the confession is therein made; or, in connection with said confession, he makes statements of facts or circumstances that are found to be true, which conduce to establish his guilt, such as the finding of secreted or stolen property, or the instrument with which he states the offense was committed. . . .<sup>2</sup>

A consideration of the policy of these provisions, in so far as they require a caution to be given the accused in situations where he makes a *confession* while under arrest would be of little practical value, in view of the fact that, by the plain terms of the statute, the Legislature has determined that policy. It is of interest, however, to note that Texas is the only jurisdiction in this country in which statutory caution is required to be given in such instances.<sup>3</sup> A similar statute<sup>4</sup> exists in England, which has been regarded by the courts of that country as not being abrogative of the orthodox common law rule,<sup>5</sup> under which confessions made while under arrest were admissible, subject to the same requirements as to voluntariness and freedom from undue influence from threats and promises as any other confessions.<sup>6</sup>

In spite of the fact that the courts outside of Texas have, with unanimity,<sup>7</sup> regarded the sole fact that the accused was under arrest as being insufficient to warrant the inference that the confession was improperly secured, and the leading writers upon the subject agree that any confession, whether the accused was warned or not, should be admitted in evidence unless it is affirmatively shown that the accused was actually influenced by fear or hope of reward or other actual influence,<sup>8</sup> the Texas cases in which confessions made while

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<sup>1</sup>Articles 726 and 727, CODE CRIM. PRO. 1925.

<sup>2</sup>The provision, "or be made in writing and signed by him, which written statement shall show, etc." was inserted by amendment in 1907. GENERAL LAWS, 1907, Chap. 18, p. 219.

<sup>3</sup>WIGMORE ON EVIDENCE, 2nd ed. Sec. 851.

<sup>4</sup>11 and 12 VICTORIA, Chap. 42, Sec. 18 (1848).

<sup>5</sup>R. v. Sansome, 4 Cox Crim. 203 (1850). WIGMORE ON EVIDENCE, 2nd ed. Sec. 848.

<sup>6</sup>WIGMORE ON EVIDENCE, 2nd ed. Sec. 842.

<sup>7</sup>Note 3, *supra*.

<sup>8</sup>GREENLEAF ON EVIDENCE, Sec. 229; note 6, *supra*.



the accused was in jail or under arrest have been held inadmissible, if uncautioned, are supported by the clear language of the statute, and it is apparent that any change or modification, however desirable, of the rule relating to such confessions must be by legislation.

This, however, cannot be said of the construction that has been placed upon the statute, the effect of which has been to place this State entirely in a class of its own with reference to the admissibility of statements and acts of the accused, not in any sense confessions, made while the accused is in jail or in the custody of an officer. A consideration of the cases in which the statute has been held to apply not only to confessions, but, as stated by Mr. Branch, to

any act in the nature of a confession, statement or circumstance done or made by defendant while in confinement or custody, and not having been properly warned, which may be used by the State as a criminative fact against him<sup>9</sup>

is, it is believed, simplified by a classification of those cases in which the statute is held to apply to verbal admissions, conduct, and exculpatory statements, respectively.

#### I.

In the early case of *Haynie v. State*,<sup>10</sup> the court laid down the rule that where the confession of a main fact is inadmissible, a confession of collateral facts tending to establish the main fact is also inadmissible. This view has been taken by the court in later cases,<sup>11</sup> with the result that the statute is held to exclude any unwarned statement made by the accused while under arrest, whether or not such statement partakes, in any degree, of the essential elements of a confession. In the case of *Willoughby v. State*,<sup>12</sup> it was held that a statement by accused to an officer that a grip containing articles alleged to have been stolen was the property of accused is inadmissible. Likewise, an admission of ownership of an automobile, made in a telegram sent from jail by one accused of transporting liquor, is inadmissible.<sup>13</sup> In the recent case of *Brent v. State*,<sup>14</sup> in which evidence of a telephone conversation had by defendant while in jail was held inadmissible, the court said:

The statutes of this state forbid the introduction against one accused of crime, of his confession or of any statement made by him while in custody and unwarned.

This language, although hardly an accurate statement of the statutory provisions, inasmuch as nothing is mentioned in the statute

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<sup>9</sup>BRANCH ANN. PENAL CODE, p. 32.

<sup>10</sup>2 Tex. Ct. App. 168 (1877).

<sup>11</sup>*Williams v. State*, 10 Tex. Ct. App. 526 (1881); note 12, *infra*.

<sup>12</sup>87 Tex. Cr. Rep. 40, 219 S. W. 468 (1919).

<sup>13</sup>*Bratton v. State*, 277 S. W. 387 (1925).

<sup>14</sup>89 Tex. Cr. Rep. 544, 232 S. W. 845 (1921).

regarding statements which are not confessions, is a terse reiteration of the view taken in previous cases,<sup>15</sup> and is a clear statement of the meaning which the court places upon the statute.

It is believed that the position taken by the court in these cases is founded upon what the court regards as the same reasons that impelled the Legislature to enact the statute, namely, a fear that the circumstances facing a man while in jail or under arrest may have the effect of depriving him of normal volition, thereby inducing him to make false assertions of guilt, and a consequent desire to protect the accused from the effects of admitting such untrustworthy assertions in evidence. It is, however, difficult to perceive how these considerations can be regarded as having sufficient weight to justify the exclusion of statements which are in no sense confessions of guilt of the offense with which the accused is charged. That the difference between statements which are confessions and statements which are mere admissions of collateral facts is fundamental, is made clear by Wigmore:

An acknowledgment of a *subordinate fact, not directly involving guilt*, or, in other words, not essential to the crime charged, is not a confession; because the supposed ground of untrustworthiness of confessions is that a strong motive impels the accused to expose and declare his guilt as the price of purchasing immunity from present pain or subsequent punishment; and thus, by hypothesis, there must be some quality of guilt in the fact acknowledged. Confessions are thus only one species of admissions; and all other admissions than those which directly touch the fact of guilt are without the scope of the peculiar rules affecting the use of confessions.<sup>16</sup>

The case of *McDaniel v. State*,<sup>17</sup> in which it was held that conversations between the accused and his wife while the accused was confined in jail could not be given in evidence by a third party who overheard the conversations, is a striking example, it is submitted, of a failure to distinguish between a statement which is a confession and a statement which is a purely voluntary admission of collateral matter. However, it is clear, from the language employed in the *Brent Case*<sup>18</sup> and from the unqualified refusal of the court to admit evidence of any inculpatory statement, in a long line of cases,<sup>19</sup> that the court, as a result either of a failure to appreciate the practical differences existing between the principles of trustworthiness under which the admissibility of confessions is to be determined and those under which the admissibility of other admissions is to be determined, or an apprehension, which, it is submitted, is unfounded, that anything said by an accused, whether it be a confession or not, is untrustworthy

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<sup>15</sup>Note 11, *supra*; note 19, *infra*.

<sup>16</sup>WIGMORE ON EVIDENCE, 2nd ed. Sec. 821.

<sup>17</sup>48 Tex. Cr. Rep. 342, 87 S. W. 1044 (1905).

<sup>18</sup>Note 14, *supra*.

<sup>19</sup>No attempt is here made to consider all of the cases. A collocation of many of them may be found in BRANCH, ANN. PENAL CODE, p. 32.

if made while under arrest, has taken the position that all admissions, of however collateral a nature, made while under arrest, are within the operation of the statute.

## II.

In the case of *Nolen v. State*,<sup>20</sup> the accused, while under arrest, upon being asked what he did with the body of the deceased, pointed to a hill where the body had previously been found. The court held that since the accused had not been given the statutory caution, evidence of his *act* was inadmissible. While there is ample justification for this holding, inasmuch as the accused's act was really a gesticulatory statement in answer to a question directly involving guilt of the offense charged, the court announced the proposition that the acts of an accused are to be regarded as subject to the same rules determining admissibility as are his confessions. 'This proposition has been accepted as the correct rule in this State,<sup>21</sup> and its application to situations in no wise analogous to the facts of the *Nolen Case*, has resulted, at least in part, in the present anomalous state of the law in Texas with reference to the admissibility of evidence of the accused's *conduct* while under arrest or in jail.<sup>22</sup> In *Fulcher v. State*,<sup>23</sup> it was held to be error to prove that the defendant seemed agitated and turned pale when told why he was arrested. The court, after quoting the rule announced in the *Nolen Case*,<sup>24</sup> to the effect that:

Where the confessions of a defendant under arrest are inadmissible against him because made while he was uncautioned, his acts, *if tantamount to such a confession* and done under similar circumstances, are likewise inadmissible,

applies the rule to a state of facts in which, it is submitted, the acts of the accused were not *tantamount to a confession*, within the purview of the very language of the rule it quoted. Whether or not the court was correct in regarding the fact that the accused seemed agitated and turned pale as being tantamount to a confession is rendered unimportant by the holdings of the later cases.<sup>25</sup> The rule, however, it evolved, is now well settled that conduct manifested by an accused while under arrest, whether such conduct is tantamount to a confession or not, is inadmissible against him. In *Hill v. State*,<sup>26</sup> evidence that the defendant took a drink of whiskey while under

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<sup>20</sup>14 Tex. Ct. App. 474 (1883).

<sup>21</sup>Notes 23, 26, 27, 28, *infra*.

<sup>22</sup>WIGMORE ON EVIDENCE, 2nd ed. Sec. 821. In a note to this section, Professor Wigmore says: "In the courts of Texas alone, it would seem, the heresy prevails that conduct may be treated as a confession."

<sup>23</sup>28 Tex. Cr. Rep. 465, 13 S. W. 750 (1890).

<sup>24</sup>Note 20, *supra*.

<sup>25</sup>Notes 26, 27, 28 and 29, *infra*.

<sup>26</sup>95 Tex. Cr. Rep. 500, 255 S. W. 433 (1923).

arrest was excluded. Other acts, such as a refusal by accused to tell his name,<sup>27</sup> an attempt by accused to bribe the officer,<sup>28</sup> and specimens of the accused's handwriting taken in jail,<sup>29</sup> are excluded.

The position taken by the court in these cases is an unfortunate one for several reasons. The fundamental basis upon which confessions, as such, are to be regarded as inadmissible, namely, their unreliability resulting from the fact that the accused, at the time of confessing, was laboring under some influence which might have induced him to make a *false* assertion of guilt, is entirely lost sight of, with the result that valuable evidence, not shown to be untrustworthy, is excluded. Since, in the nature of things, it is impossible to commit conduct to writing, the rule excluding evidence of the accused's acts is obviously a harsher one than the rule excluding confessions, inasmuch as it is possible, at least, to comply with the statute in cases where the accused confesses, and manifestly impossible to do so where the accused says nothing. The broad rule excluding evidence of conduct is, and necessarily must be, disregarded when its application would result in the absurdity of excluding evidence that the accused attempted to destroy the evidence of his guilt.<sup>30</sup>

### III.

As an original proposition, it would seem novel to regard a *denial* of guilt as being subject to the same rules of exclusion as are confessions. "If," as is pointed out by Wigmore, "legal terms are to have any meaning and if the spirit of the general principle is to be obeyed,"<sup>31</sup> exculpatory statements, or denials of guilt, must necessarily be regarded as being without the operation of the rules excluding confessions, since the sole reason for the existence of these rules is to prevent the accused from being subjected to the harmful effects of admitting in evidence against him his false assertions of guilt. That there may be something in the fact that the accused is under arrest that might render untrustworthy his denials of guilt is conceivable, but what is inconceivable is how the application of a rule based upon the principles of untrustworthiness of confessions, such as the statutory requirement that the accused be warned, can have the effect of removing the untrustworthiness, not of a confession, but of its antithesis, a denial of guilt. There has been some conflict in the decisions in Texas as to whether or not exculpatory statements are

<sup>27</sup>Carter v. State, 23 Tex. Ct. App. 508, 5 S. W. 128 (1887).

<sup>28</sup>Stanchel v. State, 89 Tex. Cr. Rep. 358, 231 S. W. 120 (1921); Riojas v. State, 277 S. W. 640 (Tex. Cr. App. 1925).

<sup>29</sup>Kennison v. State, 97 Tex. Cr. Rep. 154, 260 S. W. 174 (1924). Cf. 3 TEXAS LAW REVIEW 485.

<sup>30</sup>Kelly v. State, 278 S. W. 449 (Tex. Cr. App., 1925). The court, in holding that evidence that accused broke a jug of whiskey for the transportation of which he was indicted was admissible, said: it "would be remarkable to allow defendant to destroy evidence of his guilt."

<sup>31</sup>WIGMORE ON EVIDENCE, 2nd ed. Sec. 821.



excluded under the confessions statute. In *Quintana v. State*,<sup>32</sup> and *Ferguson v. State*,<sup>33</sup> it was held that exculpatory statements were not within the operation of the statute, and that they were admissible for the purpose of impeaching the accused's testimony, though made while under arrest and unwarned. In *Bailey v. State*,<sup>34</sup> it was held to be error for the State, for the purpose of impeaching the accused's testimony, to prove that the accused, while under arrest and unwarned, stated that he did not know anything about the crime with which he was charged. The court, citing the case of *Morales v. State*,<sup>35</sup> and ignoring the *Quintana Case* and the *Ferguson Case*, held that the statute excludes any unwarned statement made by an accused while under arrest, whether the statement be a confession or any other statement which the State may use in order to impeach his testimony. The *Morales Case* holds that a confession may not be used to impeach a defendant if the confession is one which could not, because unwarned, be used as independent evidence. While this holding is undoubtedly correct with reference to confessions, it is submitted that there is no reason for regarding it as being applicable to exculpatory statements. In *Whorton v. State*,<sup>36</sup> and *Mason v. State*,<sup>37</sup> it was held that exculpatory statements are admissible. The court, in these cases, follows the *Ferguson Case*,<sup>38</sup> and points out, upon what is believed to be uncontrovertible reasoning, that exculpatory statements cannot, upon any logical basis, be subjected to the exclusionary rules peculiar to confessions. In *Dover v. State*,<sup>39</sup> the *Whorton Case* and the *Mason Case* are disregarded, and the court adopts the rule of the *Bailey Case*,<sup>40</sup> and holds that any unwarned statement made under arrest, whether it be a confession or not, which may be used by the State either as independent evidence, or for the purpose of impeaching the accused's testimony, is inadmissible. This is the rule which is, apparently, the accepted one at the present time.<sup>41</sup>

It may, therefore, be broadly stated that, with few exceptions,<sup>42</sup>

<sup>32</sup>29 Tex. Cr. Rep. 401, 16 S. W. 258 (1891).

<sup>33</sup>31 Tex. Cr. Rep. 93, 19 S. W. 901 (1892).

<sup>34</sup>40 Tex. Cr. Rep. 150, 49 S. W. 102 (1899).

<sup>35</sup>36 Tex. Cr. Rep. 234, 36 S. W. 435 (1896).

<sup>36</sup>69 Tex. Cr. Rep. 1, 152 S. W. 1082 (1913).

<sup>37</sup>74 Tex. Cr. Rep. 256, 168 S. W. 115 (1914).

<sup>38</sup>Note 33, *supra*.

<sup>39</sup>81 Tex. Cr. Rep. 545, 197 S. W. 192 (1917). In a well considered opinion dissenting upon this point, Prendergast, J., reviews the conflicting authorities and expressly approves of the holdings of the *Whorton* and *Mason Cases*.

<sup>40</sup>Note 34, *supra*.

<sup>41</sup>*Clark v. State*, 84 Tex. Cr. Rep. 390, 207 S. W. 98 (1918). *Riley v. State*, 93 Tex. Cr. Rep. 205, 246 S. W. 664 (1923).

<sup>42</sup>The fact that accused was under arrest is no reason for excluding proof that he fled or attempted to flee from arrest. *McFarland v. State*, 45 Tex. Cr. Rep. 248, 75 S. W. 788 (1903); *Charba v. State*, 48 Tex. Cr. Rep. 316, 87 S. W. 829 (1905). If the statements and acts are part of the *res gestae*,

all conduct and uncautioned statements of an accused in jail or in confinement are, under the construction put upon the confessions statute, inadmissible. It is believed that this construction, viewed in the light of the reasons for its existence and the results it produces, is not supportable upon principle. Emanating, as it does, from a humane desire on the part of the court to render ineffectual the efforts of administrative officers to elicit confessions by means of unfair influences of any character, this construction of a statute which if strictly construed must be regarded as being, itself, extreme,<sup>43</sup> has, it is submitted, the unjustifiable effect of excluding valuable evidence which is not tainted with any of the viciousness peculiar to confessions made under influence. It is, at least, extremely doubtful whether or not any exclusionary rule is efficacious for the purpose of remedying the evil effect of obtaining confessions by the exertion of influence upon the accused.<sup>44</sup> Where the acts and statements of the accused are not confessions, and are, therefore, unlikely to be the result of influence, it is submitted that a rule excluding such acts and statements is not only unnecessary, but is materially detrimental to the proper administration of the law. It is believed that the only basis upon which the construction of the statute can be regarded as being a desirable one is the danger that police officers, when placed upon the witness stand, may testify that the accused made statements or manifested conduct which, in fact, he did not. This possible evil, the likelihood of perjury, is one which the courts have never regarded as being remediable through any rule of exclusion of evidence. Inasmuch as the confessions statute, as locally construed, represents an addition to a group of exclusionary rules already too numerous,<sup>45</sup> it is submitted that a sounder construction of the statute would be a restriction of its application to confessions alone. Such a construction would not only be the natural one, but would conform, so far as is possible under the terms of the statute, to the tendency outside of this State to restrict,<sup>46</sup> rather than enlarge, the common law rules excluding confessions.

Charles W. Bell.

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EVIDENCE—AGENCY—ADMISSIONS BY AGENTS WITHIN THE SCOPE OF THEIR AUTHORITY.—In the recent suit by the United States to cancel the Naval Reserve oil leases granted by Secretary of the Interior Fall, Doheny, the president of the two defendant oil corporations, was called as a witness by the plaintiff to explain the delivery

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they are admissible. *Johnson v. State*, 46 Tex. Cr. Rep. 291, 81 S. W. 945 (1904); *Bronson v. State*, 59 Tex. Cr. Rep. 17, 127 S. W. 175 (1910); *Gothard v. State*, 99 Tex. Cr. Rep. 452, 270 S. W. 177 (1925).

<sup>43</sup>Note 3, *supra*.

<sup>44</sup>WIGMORE ON EVIDENCE, 2nd ed. Sec. 867.

<sup>45</sup>WIGMORE ON EVIDENCE, 2nd ed. Sec. 865.

<sup>46</sup>CHAMBERLAYNE, MODERN LAW OF EVIDENCE, Sec. 1618; WIGMORE ON EVIDENCE, 2nd ed. Sec. 831.

by him of \$100,000 in cash to Secretary Fall. He asserted his privilege against self-inclination and it was sustained. The plaintiff then offered to put in evidence statements made by Doheny before the Senate committee during its investigation and before which he had voluntarily appeared. After a preliminary showing that the leases in question were negotiated by Doheny in behalf of the corporations and that these negotiations were being investigated by the committee at the time, the statements were admitted over the defendant's objection.<sup>1</sup> The Circuit Court of Appeals, in reviewing the decision of the district court, held that the statements were properly admitted in evidence against the corporations as *admissions* made by their agent within the scope of his authority.<sup>2</sup>

Statements made out of court by a party-opponent which are offered by his adversary are admitted in evidence as *admissions*. They are out of court statements offered to prove the truth of what they assert, but they escape the hearsay rule because the opponent cannot logically object to his own statements on the ground that he has not been allowed to cross examine himself or that he was not under oath at the time of making them. An added reason for the admissibility of such statements is that the opposing party is, presumably, before the court and in a position to explain or contradict the assertions.<sup>3</sup> These reasons do not apply with quite the same force in the case in which the statement of the parties' agent is offered against him, but it is universally agreed that the agent's assertions made within the scope of his authority are, in most cases, admissible in evidence against his principal.

The rule is usually stated thus: The admissions of an agent are admissible against his principal (1) when made with express authority from his principal; or (2) when made *at the time* of doing an authorized act and as a part of the *res gestae*.<sup>4</sup> Assertions made with express authority arise in the reported cases but rarely, and are easily dealt with, but the more commonly contested case of admissions made within the implied authority have presented difficulties and have evoked a mass of verbiage.

Most of the courts say that the agent's narration of *past facts* is not admissible in evidence against the principal.<sup>5</sup> This requirement that the assertion offered as an admission must have been made at the time the agent was engaged in the act concerning which the assertion was made,<sup>6</sup> no doubt springs from a confusion of the

<sup>1</sup>United States v. Pan-American Pet. Co., 6 Fed. (2d) 43 (1925).

<sup>2</sup>Pan-American Pet. Co. v. United States, 9 Fed. (2d) 761 (1926).

<sup>3</sup>WIGMORE ON EVIDENCE, 2nd Ed., Sec. 1048.

<sup>4</sup>1 GREENLEAF ON EVIDENCE, Sec. 114; MECHEM ON AGENCY, Sec. 714; COOK ON CORPORATIONS, 8th Ed., Sec. 726.

<sup>5</sup>Merchant's Nat. Bank v. Clark, 139 N. Y. 314, 36 Am. St. Rep. 710, 34 N. E. 910 (1893); Holmes v. Montauk Steamboat Co., 93 Fed. 731 (1899); Southwestern Tel. & Tel. Co. v. Gotcher, 93 Tex. 114, 119, 53 S. W. 686 (1899).

<sup>6</sup>In St. Louis Iron Mt. & So. v. Carlisle, 34 Tex. Civ. App. 268, 78 S. W. 553 (1904), it was held that statements of train conductor as to reason for



*admissions* exception to the hearsay rule with the *spontaneous statements* exception. It is submitted that the two exceptions have nothing in common and are founded on entirely separate considerations. The *admissions* exception rests upon the party-opponent's inability to logically invoke the bar of the hearsay rule, whereas, the *spontaneous statements* exception is founded upon what is conceived as an unusual likelihood of the utterance so made being true.

The requirement that the statement be made by the agent as "part of the *res gestae*" is merely an obscure way of saying that the statement must be made as a part of the performance of an authorized act. However, some courts have regarded *res gestae* as meaning the operative substantive facts of the case under consideration at the time and have refused to admit in evidence statements made in separate transactions clearly within the scope of the declarant's agency.<sup>7</sup> If such a rule is to be applied, the rule admitting agent's admissions must cease to be a separate ground of admissibility of evidence, for all relevant statements made as a part of the transaction are called "verbal acts" and are admitted as such.<sup>8</sup> They are not admitted to prove the truth of what they assert and are, therefore, not within the hearsay rule.<sup>9</sup>

It is quite clear that the orthodox statement of the rule only complicates the difficulty and thus prevents a rational application of the rule to the fact situation presented for decision. The rule may better be stated thus: The assertions of an agent are admissible against his party-opponent-principal when made within the scope of the agent's authority, express or implied, to *make assertions*. This statement solves nothing, but it can be said that it does not *hide* anything. Thus the whole question of admissibility, which is a preliminary<sup>10</sup> question for the judge, devolves into determining the question of agency just as it is ordinarily determined. Words uttered are but unusually expressive human conduct, and their appropriateness and reasonableness in carrying out a granted authority should present few difficulties not existent in every inquiry as to agency *vel non*.<sup>11</sup>

Some assertions made within the scope of the agent's authority are not admissible against his principal on account of the operation

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train being late was not as to matter then under his control and were for that reason inadmissible.

<sup>7</sup>*City of Austin v. Forbis*, 99 Tex. 234, 89 S. W. 405 (1905); *State Bank v. Brocton Fruit Juice Co.*, 208 N. Y. 492, 102 N. E. 591 (1913).

<sup>8</sup>Operative substantive facts are sometimes erroneously called "admissions" and admitted as such. *Gerlach v. Hughes-Bozart-Anderson Co.*, 189 S. W. 784 (Tex. Civ. App., 1916).

<sup>9</sup>CHAMBERLAYNE, MODERN LAW OF EVIDENCE, Sec. 1344.

<sup>10</sup>*Blain v. Express Co.*, 69 Tex. 74, 6 S. W. 679 (1887).

<sup>11</sup>These cases present a clear analysis of the fact situation dealt with: *Rosenberger v. Wilcox Motor Co.*, 145 Minn. 408, 177 N. W. 625 (1920); *Levi v. M. K. & T.*, 157 Mo. App. 536, 138 S. W. 699 (1911); *Western Union v. Erwin*, 147 S. W. 607 (Tex. Civ. App., 1912).



of other rules. Assertions of his authority as agent which are offered to prove his authority are not admissible.<sup>12</sup> Reports required of agents are, by some courts, held to be privileged.<sup>13</sup> The assertion may be excluded because within the opinion rule.<sup>14</sup>

The principles applicable to admissions of agents in general are, of course, applicable to agents and officers of corporations, but the courts occasionally take a matter of fact view of the thing and hold that the admitted dictator of a corporation is substantially the corporate fiction incarnate and treat his admissions as those of the corporation.<sup>15</sup> The circuit court, in the principal case, took this attitude toward Doheny's relation to the defendant corporations. The court said:

He was the dominating figure and the administrative officer by whom the business of the corporations was conducted, and acts done by him within the scope of the corporate powers were presumably authorized.

The court regarded him practically as the universal agent of the two oil companies and held that his admissions as to past events would be admissible in evidence against them just as they would be in a suit against an individual making them. But are the admissions of agents made by them before legislative or judicial bodies to be regarded as within the scope of their authority? The few cases which consider the admissibility of assertions made by agents in court hold that their appearance as witnesses is in their personal capacity only, for whatever purpose they may have been summoned, and that their testimony cannot be used as an admission against the principal.<sup>16</sup> May a distinction be drawn between assertions made before a legislative committee and assertions made before a judicial tribunal in this respect? Does the fact that the appearance was voluntary, as it was in the principal case, have any significance? It would seem that a voluntary appearance before a legislative body might very often be within an agent's scope of authority in these days of active legislation and investigation. Such proceedings often vitally affect property rights of individuals and corporations who

<sup>12</sup>Dreeben v. First Nat. Bank, 100 Tex. 344, 99 S. W. 850 (1907).

<sup>13</sup>Carroll v. East Tenn. R. Co., 82 Ga. 452, 10 S. E. 163, 6 L. R. A. 214 (1889); Cully v. No. Pac., 35 Wash. 241, 77 Pac. 202 (1904). *Contra*: Texas & Pac. v. Lester, 75 Tex. 56, 12 S. W. 955 (1889); Quanah & A. P. Ry. v. Galloway, 154 S. W. 653 (Tex. Civ. App., 1913).

<sup>14</sup>Levi v. M. K. & T., 157 Mo. App. 536, 138 S. W. 699 (1911).

<sup>15</sup>Wales-Riggs Plantations v. Caston, 105 Ark. 641, 152 S. W. 282 (1912); Dubuque & S. C. Railroad v. Pierson, 70 Fed. 303 (1895); American Freehold Land and Mortg. Co. v. Brown, 101 S. W. 856 (Tex. Civ. App., 1898).

<sup>16</sup>Vohs v. Shorthill Co., 124 Iowa 471, 476, 100 N. W. 495 (1904), Bangs Milling Co. v. Burns, 152 Mo. 350, 53 S. W. 923 (1899). In State of Maryland v. Soper, 46 Sup. Ct. 192 (1926), it was held that false testimony by a federal prohibition officer, given from knowledge alleged to have been secured while acting for the government, was given in his individual capacity and not as an officer so as to allow removal under Sec. 33, JUD. CODE, of prosecution in state court for false testimony.

may legitimately appear by attorney to urge the protection of their interests.

W. L. Matthews.

FRAUD AND ITS REMEDIES.—Anson, in his work on Contracts, says:<sup>1</sup>

Fraud is a false representation of fact, made with a knowledge of its falsehood, or recklessly, without belief in its truth, with the intention that it should be acted upon by the complaining party, and actually inducing him to act upon it.<sup>2</sup>

Equity courts have extended this meaning far beyond the limits set out in the above definition, and this extension has had a material influence on the common law courts. Thus the terms "legal fraud" and "constructive fraud" are now applied to situations involving no moral culpability whatever.<sup>3</sup>

Under the common law definition, a false representation of an existing fact was necessary to constitute fraud, and it was generally held that a mere expression of opinion could not be the basis of an action for fraud. Thus, what the vendor of property said it was worth and what he said he gave for it are vastly different, the former being an opinion and the latter a fact. Likewise, a statement that land is located in X County is a statement of fact, as is the statement that Austin is the capital of Texas, or that oil has been discovered on University lands. A statement, by a person asking for credit, that he is safe to be trusted, is, however, a mere opinion; and the statement that the business of a corporation will prove profitable is also an opinion.<sup>4</sup> And the courts have said that a promise cannot be fraud because it is a representation *in futuro* and not as an existing fact. If the defendant intends to carry out his promise at the time it is made, but later changes his mind, this is not fraud. He did not represent that he would continue to be of the same state of mind.

But later courts have held that where there is a relationship of trust or confidence between the parties, one may be liable for an opinion expressed to the other. Thus, a statement by a real estate broker as to the value of real estate, made to a person living at a distance who has no opportunity to examine the property, is considered as a statement of facts, and not of opinion.<sup>5</sup> These courts

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<sup>1</sup>ANSON ON CONTRACTS, Sec. 220.

<sup>2</sup>"To his damage" should be added to the above definition, being a necessary element of fraud at common law.

<sup>3</sup>" . . . to make a man liable for fraud, moral fraud must be proved against him. I do not understand legal fraud. To my mind it has no more meaning than legal heat or legal cold, legal light or legal shade," Bramwell, L. J., in *Weir v. Bell*, Law Rep. 3 Ex. 238, 243 (1878).

<sup>4</sup>*Riley v. Treanor*, 25 S. W. 1054 (Tex. Civ. App., 1894).

<sup>5</sup>*White v. Loudon*, 90 Hun. 218, 28 N. Y. Supp. 619 (1895).

consider that in such cases the party to whom the representation is made is justified in relying on it. But it is hard to see why an opinion is any more or less an opinion because of reliance being placed upon it. If the speaker honestly believes what he says, there would seem to be no fraud on the party to whom it is addressed.

The requirement that there must be a misrepresentation of an existing fact, if properly construed, gives a fairly workable test for fraud. But it does not follow that a statement of opinion or a promise may not be a misstatement of an existing fact. If the speaker actually believes what he says, there is no fraud. But if he expresses an opinion which he does not believe, or if he promises to do something when he has no intention of so doing, he deliberately falsifies his state of mind. Such a falsification may be just as much a misstatement of fact as a misstatement of price, location, existence, or death. As stated by Bowen, L. J., "the state of a man's mind is as much a fact as the state of his digestion."<sup>6</sup>

Where the plaintiff has been induced by fraudulent misrepresentations to enter into a contract to his detriment, he usually has a choice of remedies. Thus, he may elect to rescind and get back what he has paid the defendant, or he may sue in tort for deceit, or in some cases he may bring an action for breach of warranty. All courts agree that where the plaintiff has been induced by deliberate false statements to enter into a contract to his detriment, he may rescind and get back what he gave the defendant. But where the plaintiff is induced by false representations, *innocently* made by the promiser, to accept something for which he did not bargain, is rescission available to him? The majority of the American courts, including Texas, hold that he has such a remedy, and may recover for false statements innocently made.<sup>7</sup> Some courts call this fraud.<sup>8</sup> It would not seem to be fraud in the ordinary sense of the term, since the defendant is not morally blameworthy. When the innocent party is misled, he should be allowed rescission, whether the misrepresentation be innocent or fraudulent.

The English courts hesitate to rescind a transaction that is fully executed, and indeed, rescission will be denied except (1) where the misrepresentation was fraudulent; or (2) where the promisee receives something totally different from that represented, i. e., where there is "error in substantialibus" or substantial error.<sup>9</sup> This distinction seems unsound.<sup>10</sup>

In Texas it has been held that rescission will not be granted unless

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<sup>6</sup>Bowen, L. J., in *Edington v. Fitzmaurice*, 29 Ch. Div. 459, 483 (1885).

<sup>7</sup>27 YALE L. JOUR. 929; WILLISTON ON CONTRACTS, Vol. 3, Sec. 1500.

<sup>8</sup>In *Ry. v. Maples*, 162 S. W. 426 (Tex. Civ. App., 1913), the court defines fraud as ". . . any act, omission, or concealment which involves a breach of legal duty, trust or confidence, justly reposed, and is injurious to another, or by which an undue and unconscientious advantage is taken of another."

<sup>9</sup>BOWER, ACTIONABLE MISREPRESENTATION, Sec. 262-264.

<sup>10</sup>27 YALE L. JOUR. 929.



the injured party has suffered some pecuniary loss.<sup>11</sup> Obviously, such a conclusion is sound in so far as plaintiff is attempting to recover damages for deceit,<sup>12</sup> but it would seem inequitable to lay down such a doctrine when plaintiff is only seeking to rescind the agreement.<sup>13</sup> In *Russell v. Industrial Transportation Co.*,<sup>14</sup> plaintiff was induced by the defendant to purchase stock which he would not have purchased except for certain false statements of the defendant. To say that he must keep that which he does not want simply because he suffered no pecuniary loss would seem to strike at the very foundation of equity. If a person bargains for a horse but receives a cow, should he be compelled to keep the cow simply because the cow has as great a market value as the horse?

The Texas courts have apparently confused the remedy of rescission with the tort action of deceit, and require some pecuniary loss in both cases. The doctrine enunciated in the *Russell Case*, requiring pecuniary loss as an element in an action for rescission, seems an unfortunate limitation on the scope of this remedy and is probably unsound.<sup>15</sup>

It is generally held<sup>16</sup> that any representation of fact as to the condition of goods, made for the purpose of inducing the buyer to purchase them, constitutes a warranty. Here again the representation must be one of *fact*, as distinguished from *opinion*. Thus, if the vendor represents to the vendee that "this is the best cow pony in the world," the statement would clearly be one of opinion and not of fact. But if the vendor represents his cotton to be "high grade middling cotton," this is a statement of fact and could be the basis for an action for breach of warranty.

The action of warranty originated in the action of deceit and was for a long time regarded as a tort action. Modern courts, however, have conceived that the liability upon a warranty is contractual while that for misrepresentation is tort.<sup>17</sup>

Where there has been a breach of warranty, the buyer may sue for damages, or in certain cases, he may elect to rescind. In England,<sup>18</sup> the courts refuse to rescind an executed sale for breach of warranty, and our United States Supreme Court likewise distinguished between executory and executed contracts, denying rescission

<sup>11</sup>*Russell v. Industrial Transportation Co.*, 113 Tex. 441, 258 S. W. 462 (1924).

<sup>12</sup>*George v. Hesse*, 100 Tex. 44, 93 S. W. 107, 8 L. R. A. (N. S.) 804, 123 Am. St. Rep. 772, 15 ANN. CAS. 456 (1906).

<sup>13</sup>*Morrow v. Ursini*, 96 Conn. 219, 113 Atl. 388 (1921); *Brett v. Cooney*, 75 Conn. 338, 53 Atl. 729 (1902).

<sup>14</sup>Note 11, *supra*.

<sup>15</sup>2 TEXAS LAW REVIEW, 524.

<sup>16</sup>*Blythe v. Speake*, 23 Tex. 429 (1858).

<sup>17</sup>WILLISTON ON CONTRACTS, Sec. 1505; 24 HARV. L. REV., 415. Williston says that the action of warranty is not purely contractual but is quasi-contractual, and is recognized as a hybrid between tort and contract.

<sup>18</sup>*Street v. Blay*, 2 B. & Ad. 456 (1831).



in the former,<sup>19</sup> but the federal courts now apply either doctrine which is locally in force, rather than a single rule based on decisions of the Supreme Court of the United States.<sup>20</sup> The state courts are about evenly divided, the modern tendency being toward allowing rescission even though the contract is executed.<sup>21</sup> Texas follows the English holding, confining rescission for breach of warranty to executory contracts, except where there is actual fraud or where it is agreed that the parties may rescind for breach of warranty.<sup>22</sup>

The general measure of damages for breach of warranty is the difference between the value of the article actually furnished the buyer, and the value the article would have had if it had been as represented. This is in accord with the general rule of contracts<sup>23</sup> that, where there is a breach of contract, the measure of damages is the net value of the contract, or what would have been realized had the contract been performed.

Perhaps the action most resorted to by a defrauded party is the tort action of deceit. The remedy here is damages for the loss caused by the wrongful act of the defendant. The theory of damages in this action is such damages as to make the injured party whole. His loss is the difference between the value of that which he parted with and the value of that which he received under the agreement. Logically, therefore, what he has lost by the transaction is the measure of his damages. Such is the rule in England and in our federal courts.<sup>24</sup> The state courts are divided, the weight of authority probably allowing the same recovery for deceit as is allowed for breach of warranty.<sup>25</sup> Texas follows the English and federal rule here, also, allowing recovery only for the difference in the value of the property received and that parted with.<sup>26</sup>

The Texas rule as stated in *George v. Hesse*,<sup>27</sup> seems logical and is in accord with the usual theory of damages for torts. But in an action for breach of warranty, the plaintiff may recover the difference in the actual value of the property and its represented value. The inconsistency in the two measures of damages becomes apparent when it is considered that the same cause of action can often be the basis for breach of warranty and for deceit, and under our simplified system of pleading it may not be clear upon what theory the plaintiff

<sup>19</sup>*Thornton v. Wynn*, 12 Wheat. 183, 6 L. Ed. 595 (1827); *Lyon v. Bertram*, 20 How. 149, 15 L. Ed. 847 (1857).

<sup>20</sup>WILLISTON ON SALES, Sec. 608 and cases there cited.

<sup>21</sup>WILLISTON ON SALES, Sec. 608.

<sup>22</sup>*Wright v. Davenport*, 44 Tex. 164 (1875); *Piano Co. v. Thomas*, 36 Tex. Civ. App. 78, 80 S. W. 1063 (1904); 2 TEXAS LAW REVIEW 502.

<sup>23</sup>SEDGWICK, ELEMENTS OF THE LAW OF DAMAGES, 2nd Ed., p. 225.

<sup>24</sup>WILLISTON ON CONTRACTS, Sec. 1392.

<sup>25</sup>WILLISTON ON SALES, Sec. 613; WILLISTON ON CONTRACTS, Sec. 1391.

<sup>26</sup>Note 12, *supra*; *Booth v. Coward*, 265 S. W. 1026 (Tex. Comm. App., 1924).

<sup>27</sup>Note 12, *supra*.

is attempting to maintain his suit. The modern tendency<sup>28</sup> is toward allowing the same measure of damages for deceit as he would have obtained in a breach of warranty, i. e., what he would have gained if the contract had been carried out.

The celebrated case of *Derry v. Peek*<sup>29</sup> has apparently settled the law in England, holding that an action of deceit could not be sustained unless the false representation was made "knowingly, or without belief in its truth, or recklessly, careless whether it be true or false," i. e., made with conscious dishonesty. Some American courts follow *Derry v. Peek* in the requirement that there must be actual fraud to maintain the action of deceit.<sup>30</sup> Others are inclined to qualify this doctrine.

It has been repeatedly said that a deliberate misstatement is not necessary to maintain an action of deceit in Texas. Many of these cases, however, arose where the plaintiff was seeking to rescind the contract, and where, therefore, there was no necessity for actual fraud. In some instances, however, the Texas courts have given the plaintiff damages in a tort action even though the defendant's statements were honestly made. The courts state that this constitutes fraud, but their reasoning is objectionable. It would seem that if the defendant is to be held, it should be on some theory akin to negligence.

Several Courts of Civil Appeals cases have held that damages in tort for deceit would lie, although the misrepresentations were innocent. Thus, in *Barclay v. Deyerle*,<sup>31</sup> the plaintiff was induced to buy bank stock by the false representations of the defendant as to the correctness of the books of the bank. He was allowed to recover damages as for deceit, even though the defendant did not intend to misrepresent the facts. And in *Piano Co. v. Gibbon*,<sup>32</sup> plaintiff bought a piano, relying on the representations of the defendant. These representations were false but were innocently made, and the court held that in an action for deceit it is not necessary to aver or prove that the defendant knew the representations were false, it being sufficient if they were false and were relied on by the plaintiff to his damage. Again, in *McDonald v. Lastinger*,<sup>33</sup> the defendant gave the plaintiff his note and some land in exchange for certain stock. Plaintiff sued on the note and for damages. The Court of Civil Appeals, recognizing the defendant's cross action as being in deceit, affirmed the judgment for defendant, saying that it was immaterial whether the plaintiff knew his representations to be false,

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<sup>28</sup>WILLISTON ON CONTRACTS, Sec. 1391, 1392.

<sup>29</sup>14 App. Cas. 337 (1889).

<sup>30</sup>30 YALE L. JOUR. 309.

<sup>31</sup>116 S. W. 123 (Tex. Civ. App., 1909).

<sup>32</sup>180 S. W. 1185 (Tex. Civ. App., 1915).

<sup>33</sup>214 S. W. 829 (Tex. Civ. App., 1919).

since in fact they were false.<sup>34</sup> There is dictum to the same effect in *Booth v. Coward*.<sup>35</sup>

The Texas law, in so far as real estate and corporate stock is concerned, has been materially altered by an act of the legislature in 1919, defining actionable fraud.<sup>36</sup> Fraud may now consist not only of a misrepresentation of an existing fact but also of a "false promise to do some act in the future." The language of the last clause is unfortunate. Just what is meant by a false promise? Apparently the statute recognizes three subdivisions: (a) promises which were never intended to be kept, for which double damages may be secured; (b) promises originally intended to be kept (i. e., not wilful), for which actual damages may ordinarily be recovered; and (c) promises in which the non-performance may be answered by an affirmative defense establishing act of God, public enemy, or some "equitable reason."

It will be noticed that the statute changes the law to be applied in ascertaining actual damages. Formerly the doctrine of *George*

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<sup>34</sup>See to the same effect: *Wells v. Driskell*, 149 S. W. 205 (Tex. Civ. App., 1912); *Ford v. Sims*, 190 S. W. 1165 (Tex. Civ. App., 1917); *Zavala Land Co. v. Tolbert*, 184 S. W. 523 (Tex. Civ. App., 1916); *Harris v. Shear*, 177 S. W. 136 (Tex. Civ. App., 1915); *Benton v. Kuykendall*, 160 S. W. 438 (Tex. Civ. App., 1913); *McCord-Collins Co. v. Levi*, 21 Tex. Civ. App. 109, 50 S. W. 606 (1899); *Wimple v. Patterson*, 117 S. W. 1034 (Tex. Civ. App., 1909); *Thompson v. Shifflet*, 267 S. W. 1030 (Tex. Civ. App., 1924); *Spencer v. Womack*, 274 S. W. 175 (Tex. Civ. App., 1925); *Carver v. Moore*, 275 S. W. 90 (Tex. Civ. App., 1925); *White v. Carlton*, 277 S. W. 701 (Tex. Civ. App., 1925).

<sup>35</sup>265 S. W. 1026 (Tex. Comm. App., 1924).

<sup>36</sup>Art. 3973a, b, c, COMP. STAT. 1920, now Art. 4004, REV. CIV. STAT., 1925.—Actionable fraud in this State with regard to transactions in real estate or in stock in corporations or joint stock companies shall consist of either a false representation of a past or existing material fact, or false promise to do some act in the future which is made as a material inducement to another party to enter into a contract and but for which promise said party would not have entered into said contract. Whenever a promise thus made has not been complied with by the party making it within a reasonable time, it shall be presumed that it was falsely and fraudulently made, and the burden shall be on the party making it to show that it was made in good faith but was prevented from complying therewith by the act of God, the public enemy or by some equitable reason. All persons guilty of such fraud shall be liable to the person defrauded for all actual damages suffered, the rule of damages being the difference between the value of the property as represented or as it would have been worth had the promise been fulfilled, and the actual value of the property in the condition it is delivered at the time of the contract. All persons making the false representations or promises and all persons deriving the benefit of said fraud, shall be jointly and severally liable in actual damages, and in addition thereto, all persons wilfully making such false representations or promises or knowingly taking the advantage of said fraud shall be liable in exemplary damages to the person defrauded in such amount as shall be assessed by the jury, not to exceed double the amount of the actual damages suffered. [Acts 1919, page 77.]



v. *Hesse*,<sup>37</sup> which gave the plaintiff only an amount sufficient to restore him to his position before entering into the contract, controlled in Texas. Under the statute he may recover what he would have gained if the contract had been performed. In other words, the contract theory of damages is substituted for the tort theory for all transactions in real estate or corporate stock.

The statute is remedial and should be liberally construed. But so far it seems to have been in the main overlooked or disregarded. Perhaps the placing of the title "Frauds" before title "Fish" in the supposedly alphabetically arranged 1925 statutes<sup>38</sup> contributes to the difficulty. In *Loveless v. Johnson*<sup>39</sup> and *Carver v. Moore*,<sup>40</sup> the rule of *George v. Hesse* was followed and the statute, though apparently applicable, was not even mentioned. *White v. Carlton*<sup>41</sup> makes an unsatisfactory attempt to take the case out of the statute by arguing than an exchange of land is not a transaction in real estate. In *Booth v. Coward*,<sup>42</sup> the Commission of Appeals reiterated the doctrine of *George v. Hesse* and made no mention of the statute, but in that case the record shows that the cause of action arose prior to 1919. *Rick v. Farrell*<sup>43</sup> stands out as an oasis in a desert, for here the statute was both observed and applied.

B. Leon Bradley.

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MUNICIPAL CORPORATIONS—HOME RULE AMENDMENT APPLIED TO CITIES NOT HAVING HOME RULE CHARTERS.—In a recent case<sup>1</sup> a statute, pursuant to which the city of Houston attempted to annex the adjoining city of Magnolia Park, was held unconstitutional because it conflicted with Section 5, Article XI,<sup>2</sup> of the Texas Constitution as amended in 1912. The statute provided:

Any city having a population of one hundred thousand and under one hundred and fifty thousand, as shown by the last United States census, shall have the power and the authority to amend its charter so as to

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<sup>37</sup>Note 12, *supra*.

<sup>38</sup>1925 REV. CIV. STAT., Titles 65 and 67.

<sup>39</sup>274 S. W. 658 (Tex. Civ. App., 1925).

<sup>40</sup>275 S. W. 90 (Tex. Civ. App., 1925).

<sup>41</sup>277 S. W. 701 (Tex. Civ. App., 1925), criticized in 4 TEXAS LAW REVIEW 386.

<sup>42</sup>265 S. W. 1026 (Tex. Comm. App., 1924).

<sup>43</sup>266 S. W. 522 (Tex. Civ. App., 1924).

<sup>1</sup>*City of Houston v. City of Magnolia Park*, 276 S. W. 685 (Tex. Comm. App., 1925).

<sup>2</sup>Cities having more than five thousand (5000) inhabitants may, by a majority vote of the qualified voters of said city, at an election held for that purpose, adopt or amend their charters, subject to such limitations as may be prescribed by the legislature, and providing that no charter or any ordinance passed under said charter shall contain any provision inconsistent with the constitution of the state, or with the general laws enacted by the legislature of this state.



extend its boundary limits by annexing additional territory adjacent and contiguous to such city where the territory so annexed does not include any incorporated city or town having more than five thousand inhabitants according to the last United States census.<sup>3</sup>

The court held that the city of Magnolia Park had passed beyond the scope of the statute since it had a population of more than five thousand, although that population had been acquired subsequent to the last United States census. With reference to Magnolia Park the court said: "it had a right at that time to say for itself whether it would keep its charter as it had been, or adopt a new one under the Home Rule Amendment" or adopt a charter in which it consented to be annexed to the city of Houston. Elsewhere in the opinion it is observed: "the legislature did not have the power to deprive Magnolia Park, or any other such city, of its right to adopt and amend its own charter at any time after it had more than 5000 inhabitants."

Is the Home Rule Amendment so broad as to vest every city in that class with an irrevocable option as to what sort of a charter it may choose?

The principle is well recognized that in the absence of state constitutional limitations reserving the right of local self-government to cities they have no such right.<sup>4</sup> The legislature may, under our law, authorize one city to annex another adjacent to it when the latter is protected by no constitutional provision.<sup>5</sup>

In *Vincent v. Wayland*<sup>6</sup> it was held that the legislature could not grant a charter to a city having a population of more than five thousand by special act, although the city in question did not have a home rule charter. That case was decided on the ground that the Home Rule Amendment replaced the former constitutional provisions as to special charters, and that as there were no provisions in the constitution as amended relating to special charters the legislature had no power to grant them. It does not seem to be authority for the proposition that the Home Rule Amendment confers on any city having a population of more than five thousand the right to change its own charter in the event that it has not previously adopted a home rule charter.

It may be safely said, as already observed, that there is in this state no doctrine of the inherent right of local self-government, consequently the legislature may destroy municipalities at will unless prevented by Section 5, Article 11. The cities which have adopted home rule charters pursuant to the Home Rule Amendment and the Enabling Act<sup>7</sup> have the full power of local self-government subject

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<sup>3</sup>Art. 773a, VERNON'S ANN. CIV. SUPP., 1922.

<sup>4</sup>*Trenton v. New Jersey*, 262 U. S. 182, 67 L. Ed. 937, 43 Sup. Ct. 534 (1923); *Blessing v. City of Galveston*, 42 Tex. 641 (1875).

<sup>5</sup>*City of Oak Cliff v. State*, 77 S. W. 24 (Tex. Civ. App., 1903).

<sup>6</sup>235 S. W. 1084 (Tex. Comm. App., 1921).

<sup>7</sup>Title 28, Ch. 13, VERNON'S ANN. CIV. STAT. 1925, Vol. 2.

to the general law and the constitution.<sup>8</sup> It is assumed that the charters of these cities are not subject to revocation by the legislature. The controversy is as to those cities which have not adopted such charters.

The only case found closely in point is *Lynch v. State*.<sup>9</sup> The question there was whether a city which had not adopted a home rule charter under the Ohio Constitution could operate a municipal motion picture theater. The constitutional provisions were:

Municipalities shall have authority to exercise all powers of local self-government and to adopt and enforce within their limits such local police, sanitary, and other similar regulations as are not in conflict with general laws.

Any municipality may frame and adopt or amend a charter for its government and may, subject to the provisions of Section 3 (above) of this article exercise thereunder all powers of local self-government.<sup>10</sup>

In addition to holding that the maintenance of a municipality owned motion picture playhouse was not a municipal function the court held that the city could not exercise the right of local self-government since it had not adopted its own charter. The latter ruling was founded on the argument that the general law in operation at the time of the passing of the amendment was still in effect, that the city of Toledo was still controlled by that law, and that the constitutional amendment extended to cities the privilege of choosing their own charters, but that the benefits of home rule could not be enjoyed until the cities had adopted home rule charters.

This reasoning is apparently applicable to the principal case, yet if carried to an extreme, when the very existence of a city is concerned, is not the general law exalted above the constitutional amendment? Suppose that the Texas Legislature should enact a law prohibiting all cities over five thousand which had not adopted home rule charters from so doing. Would not such a statute be clearly in contravention of Section 5, Article XI? Obviously the general law would be placed above the constitutional amendment. Yet it follows that such a statute would be valid had the attempt made in the principal case been successful. The purpose of the Home Rule Amendment presumably is, in this as in other states<sup>11</sup> to prevent legislative interference with local affairs. The constitution having provided the cities with a means of escaping legislative intermeddling, can it be more reasonably argued that the municipality loses this potential freedom through failure to act or is it more reason-

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<sup>8</sup>*Le Gois v. State*, 80 Tex. Cr. App. 356, 190 S. W. 724 (1916).

<sup>9</sup>88 Ohio St. 71, 102 N. E. 670, ANN. CAS. 1914D 949 (1913). This case was later overruled on the proposition that there existed the inherent right of local self-government; the personnel of the court had changed and the judge who wrote the opinion had dissented in the *Lynch* case. *Perrysburg v. Ridgway*, 108 Ohio St. 245, 140 N. E. 595 (1923).

<sup>10</sup>Article XVIII, Secs. 3 and 7.

<sup>11</sup>19 R. C. L. 748.

able to say that the freedom is vested, and that the legislature cannot take it away? It seems unjust to require these cities to anticipate their destruction; to require them to adopt charters which may be no more satisfactory than those which they have in order to place themselves on the same basis as other cities which are for all other purposes in the same category. The constitution gives these cities an option of having home rule charters with no time limit as to the exercise of that option. The legislature is not given the power under the constitution to determine at what time the cities' option shall be exercised.<sup>12</sup>

The argument that the option of adopting a home rule charter is analogous to the contract doctrine of loss of the option on failure to accept is not applicable since municipal charters do not partake of the nature of contracts.<sup>13</sup>

There is the fear that if cities are not regulated chaos in local legislation will result. Because of this apprehension it is contended that the city powers should be extended as little as possible. This contention applies equally well to those cities having home rule charters. The argument is essentially a policy argument which the court could not adopt since the policy of the state is set forth in the constitution.<sup>14</sup>

Although objections which might be offered to the principal case are strong it is submitted that the conclusion of the court rests upon a firm basis.

*Wm. Q. Boyce.*

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USURY.—Usury originally meant the exaction of any charge for the use or detention of money. Such charges were in themselves deemed immoral; and according to ancient English statutes all usury was prohibited as being against the laws of God, the laws of the realm and the laws of nature. However evil the practice may have been considered, it was sanctioned by the law of Moses in favor of the Jews against the Gentiles.<sup>1</sup> From this early idea of vice inhering in such a transaction, the law progressed. In A. D. 1545 the first statute permitting the collection of interest was passed in

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<sup>12</sup>Unless the limitation in Sec. 5, Art. 11, requiring the city's charter and ordinances to be consistent with the constitution and general law be interpreted in such a manner as to render the whole provision ineffectual. It has not been so interpreted. In determining the city's powers under the amendment it has been held with reference to a home rule city that the city council gets its power from the sovereign people subject to the foregoing limitations. *Xydias Amusement Co. v. City of Houston*, 185 S. W. 415 (Tex. Civ. App., 1916). Legislation by the municipalities is confined to matters of local self-government and police regulations. *Green v. City of Amarillo*, 244 S. W. 241 (Tex. Civ. App., 1922).

<sup>13</sup>*Blessing v. City of Galveston*, note 4, *supra*.

<sup>14</sup>*Snodgrass v. State*, 46 Tex. Cr. App., 615, 150 S. W. 162, 41 L. R. A. (N. S.) 1144 (1912).

<sup>1</sup>Deut. XXIII: 20.



England.<sup>2</sup> "Usury," today, is interest in excess of the amount allowed by law;<sup>3</sup> and in absence of statutes establishing a maximum rate of interest which may be charged, there can be no usury.<sup>4</sup> But if this legal rate be exceeded, we view the transaction in the light of ancient principles and declare "all contracts for usury are contrary to public policy and void."<sup>5</sup>

"Usury" is interest in excess of the amount allowed by law. The highest amount allowed by law is 10 per cent per annum.<sup>6</sup> This is the statutory definition of usury in Texas. It would seem impossible to frame a rule more simple or clear. Its application would seem to be the work of an instant; but such has not been the case. The courts have been confronted with every conceivable device for evading the statute; so it is natural that the decisions should not be uniform in construing or applying it. The courts will not be balked nor led astray by ingenious manipulation of words nor figures in ascertaining whether the contract is in fact usurious since "It is quite immaterial in what manner or form, or under what pretenses it is cloaked, if the intention was to reserve a greater rate of interest than the law allows for the use of money, it will vitiate the contract with the taint of usury."<sup>7</sup> The big problem is, however, not in penetrating the guises concocted by man, but in determining the character of the transaction revealed.

The Commission of Appeals in the recent case of *Shropshire v. Commerce Farm Credit Company*,<sup>8</sup> the judgment being adopted by the Supreme Court, made a remarkable simplification of the law with reference to usury. The suit in that case was upon a contract which called for the payment of twelve per cent per annum for the first five years of the loan and for six per cent per annum for the last five years of the loan, or as the parties supposed, an average rate of nine per cent for the entire term. The Court of Civil Appeals, in an opinion rendered by Judge Boyce,<sup>9</sup> held the contract not to be usurious, the test for usury being whether or not the interest charges agreed to be paid under the terms of the contract exceed the amount of interest that would accrue for the term of the loan figured at the full legal rate. In this view the court seemed to have been well fortified by a statement of Judge Bell in *Mills v. Johnson*,<sup>10</sup> wherein he said, "The law in deciding whether a settlement involves usury or not, will look at the whole amount of interest reserved and

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<sup>2</sup>37 HEN. VIII, c. 9.

<sup>3</sup>TEX. REV. CIV. STAT., 1925, Art. 5069.

<sup>4</sup>Whitworth v. Davey, 216 S. W. 736 (Mo., 1919); Newton v. Wilson, 31 Ark. 484 (1876); WEBSTER'S INT. DIC.

<sup>5</sup>REV. CIV. STAT., 1925, Art. 5069.

<sup>6</sup>TEX. CONST., Art. 16, Sec. 11; REV. CIV. STAT., 1925, Art. 5071.

<sup>7</sup>Mitchell v. Napier, 22 Tex. 120 (1858).

<sup>8</sup>280 S. W. 181 (Tex. Comm. App., 1926).

<sup>9</sup>266 S. W. 612 (Tex. Civ. App., 1924).

<sup>10</sup>23 Tex. 309, 329 (1859). *Accord*, Clement Mortgage Co. v. Johnston, 83 Okla. 153, 201 Pac. 247 (1921).



to the whole period of forbearance extended; and if the charges properly imputable to interest do not exceed the highest interest allowed by law, for the whole period of forbearance, then the settlement cannot be held usurious." And upon this principle has been grafted the corresponding doctrine that provisions in the contract calling due all unpaid interest and principal in event of default in payments do not make the contract usurious for, "It is on the assumption that contracts will be performed according to their stipulations by the parties to them, and not upon the supposition that they will be violated that their legality should be determined."<sup>11</sup> But the court in the principal case came to the conclusion that the collection of more than ten per cent interest during any year of the term renders the entire contract usurious. Nor would the court allow, in absence of a showing that the parties so intended, the application of excess interest payments during the first five years towards a reduction of the principal debt. This holding cannot be excelled for clarity and definiteness in the establishment of a rule of law. The only regret is that it comes at such a late day.

The other point discussed in the *Shropshire Case* was whether or not the highest legal rate of interest may be lawfully collected in advance. The affirmative of this proposition had been previously held in a Civil Appeals opinion.<sup>12</sup> In denying the soundness of that case the Commission of Appeals took occasion to point out the "vital distinction" between our statute on usury and the Statute of 12 Anne and American statutes patterned after it. The English statute provides for the "reservation" of interest;<sup>13</sup> while our statute does not contain that word. The court reasoned that this difference in terminology accounted for the English and American cases permitting the collection of interest in advance. This distinction may or may not be sound, but it is not the principle upon which the English and American cases have proceeded. "The taking of interest in advance is allowed for the benefit of trade, although by allowing it more than the legal rate of interest is in fact taken."<sup>14</sup> This prac-

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<sup>11</sup>*Crider v. San Antonio Real Estate Building and Loan Assn.*, 13 Tex. Civ. App. 40, 37 S. W. 237, affirmed, 89 Tex. 597, 35 S. W. 1047 (1896). *Accord*, *Dugan v. Lewis*, 79 Tex. 246 (1891); *Seymour Opera House v. Thurston*, 18 Tex. Civ. App. 417, 45 S. W. 815 (1898, writ of error denied); *Smith v. Parsons*, 55 Minn. 520, 57 N. W. 311 (1893); *WEBB ON USURY*, Sec. 120. Apparently, *contra*, *Shear v. Hall*, 235 S. W. 195 (Tex. Comm. App., 1921). The court in this case held that foreclosure and sale under a deed of trust, after default, which resulted in the collection of interest accrued and unaccrued, rendered the contract usurious in its execution whether or not it was usurious in inception.

<sup>12</sup>*Webb v. Pahde*, 43 S. W. 19 (Tex. Civ. App., 1897).

<sup>13</sup>"No person . . . shall have, receive, accept or take in lucre or gains for the forbearing." 37 Hen. VIII (1545) *PICKERING'S STATS.*, Vol. V, p. 225. *Semle*, 12 Anne (1713), *PICKERING'S STATS.*, Vol. 13, p. 118.

<sup>14</sup>*N. Y. Firemen Ins. Co. v. Ely*, 2 Cowen 678, 704 (N. Y., 1824). *Accord*: *Tholen v. Duffy*, 7 Kan. 405 (1871). Taking the full legal rate in advance on a loan for one year is a matter of universal practice and may be con-

tice was originally confined to bankers and other concerns authorized to make discounts, but as valid reasons could not be given for so limiting the rule, it was extended to individuals.<sup>15</sup>

*R. G. Hughes.*

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sidered as ingrafted on the law as a settled rule. In *Floyer v. Edwards*, Cowp. 112 (1774), Lord Mansfield observed: "Upon nice calculation, it will be found that the practice of the banks in discounting bills, exceeds the rate of five per cent; for they take interest upon the whole sum for the whole time the bills run, but pay only part of the money, viz., by deducting the interest first; yet this is not usury."

<sup>153</sup> PARSON'S CONT., p. 131.

## RECENT CASES

**ACCORD AND SATISFACTION—RETENTION OF CHECK FOR AN UNREASONABLE TIME HELD TO CONSTITUTE ACCEPTANCE.**—The bank sued Willis and others to recover on an unliquidated demand. Willis pleaded that the plaintiff was bound by a composition with creditors. The plans for this composition had been sent to plaintiff and not rejected by it. A cashier's check, which was sent to it for its pro rata share of the first payment under the agreement, was retained, but not cashed, without any notification of a refusal to accept it, until suit was instituted a year and a half later. The debtors meanwhile had carried out their part of the agreement by paying cash and executing notes for the balance. *Held*, that the retention of the check for this length of time, as a matter of law, constituted an acceptance and bound the bank to the composition. *Willis v. City Nat. Bank*, 280 S. W. 270 (Tex. Civ. App., 1925. Writ of error refused.)

Acceptance of a check for a smaller amount on a liquidated or undisputed demand, in the absence of some consideration other than the check, will not constitute satisfaction even though it was stipulated that its acceptance could only be in full satisfaction. *First Tex. Prudential Ins. Co. v. Connor*, 209 S. W. 417 (Tex. Civ. App., 1919); *Schulze v. Waco Land & Trust Co.*, 177 S. W. 157 (Tex. Civ. App., 1915). But when the demand is unliquidated or in bona fide dispute, acceptance of a check sent with the same stipulation constitutes satisfaction. *Lapp v. Smith*, 183 Ill. 179, 55 N. E. 717 (1899); *Hunt v. Ogden*, 58 Tex. Civ. App. 443, 125 S. W. 386 (1910) (writ of error refused); WILLISTON, CONTRACTS, Sec. 1854. After the check has been accepted as satisfaction, a subsequent refusal to treat it as such and a failure to cash it, will not revive the canceled indebtedness. *Rose v. Lilly*, 170 S. W. 483 (Ark., 1914); *Columbus Mut. Life Ins. Co. v. Nat. Life Ins. Co.*, 100 Ohio St. 208, 125 N. E. 664 (1919).

Suppose the creditor, when he receives a check with this stipulation, holds the check and informs the debtor that he will only accept it in part payment of the demand? If the debtor fails to reject this conditional acceptance, the collection of the check after a reasonable time for such rejection will not operate as a satisfaction. *Frank v. Frost*, 170 Wis. 353, 174 N. W. 911 (1919); 1 R. C. L. 197. If the debtor instructs the creditor to accept the remittance as full payment or return it, retention will constitute satisfaction. *Fuller v. Kemp*, 138 N. Y. 231, 33 N. E. 1034, 20 L. R. A. 785 (1893); *Washington Natural Gas Co. v. Johnson*, 123 Pa. St. 576, 16 Atl. 799 (1889). A retention for an unreasonable length of time, without any communication of a refusal to accept it on the condition stipulated, is held to constitute acceptance of the check. *Western Pac. Land Co. v. Wilson*, 19 Cal. App. 338, 125 Pac. 1076 (1912) (retention for one month); *Day-Luellwitz Lumber Co. v. Serrell*, 177 Ill. App. 30 (1913) (retention for three months); WILLISTON, CONTRACTS, Sec. 1854. The cases of *Patten v. Lynett*, 133 App. Div. 746, 118 N. Y. S. 185 (1909) and *Wilkesbarre Realty Co. v. Atkins*, 142 N. Y. S. 324 (Sup. Ct., 1913), have been cited as contra to this proposition, but they can be distinguished. In the former case the debtor accepted a return of the check and in the latter notice was sent to him that it would not be accepted as full satisfaction.

In the instant case as there was no protest against acceptance of check in full and as the check was not returned until after suit was brought, the court correctly held that there was an accord and satisfaction as well as a binding acceptance of the composition agreement. For a discussion of silent acqui-

escence as constituting acceptance of an offer to enter into a bilateral contract, see 4 TEXAS LAW REVIEW, 355.

H. G.

**ADOPTION—LIABILITY OF ADOPTIVE PARENT FOR MAINTENANCE OF CHILD WHERE CUSTODY NOT TRANSFERRED.**—Defendant appealed from conviction for wilful refusal to support a child adopted under the provisions of REV. CIV. STAT. 1911, Art. 1. Defendant claimed that, since parental authority had not been transferred as provided in Art. 3, he could not be held under Art. 5, which gave the child "so adopted" the same rights against the adoptive parent "for support and maintenance and for proper and humane treatment, as a child has by law against lawful parents." *Held*, that Art. 5 applied only where the natural parents transfer their authority, and that therefore a child, when adopted as a legal heir under Article 1, had only the rights of inheritance. The adopting parent must, with his own act, relieve the natural parents of their obligation and himself assume it. *Kurtz v. State*, 277 S. W. 685 (Tex. Cr. App., 1925).

Adoption is unknown at common law, and in Texas is solely the creature of statute. The decision, under these statutes, is clearly sound. There is a question whether a similar result would be reached under the states as they appear in the recent revision. Articles 2 and 5, REV. CIV. STAT. 1911, were combined to make Article 43, REV. CIV. STAT. 1925, which reads as follows: "When such statement is so recorded it shall entitle any child so adopted to all the rights and privileges of a legal heir of the adoptive parent, *as a child has by law against lawful parents*. If the adoptive parent has at the time of such adoption or shall thereafter have, a child begotten in lawful wedlock, such adopted heir shall in no case inherit more than one-fourth of the estate of the adoptive parent." This article follows immediately after the provision for adoption of a "legal heir," and precedes the article allowing transfer of parental authority. The italics in the quotation indicate the only words of the old Article 5 which are incorporated in the new article.

Our courts have always confined the rights given by adoption (without transfer of authority) to inheritance. The statute conferred the rights of an heir only, not making the adopted child a member of the family of adopter, nor investing him with the privileges and duties of the relation of parent and child. *Eckford v. Knox*, 67 Tex. 200, 2 S. W. 372 (1886); *Harle v. Harle*, 109 Tex. 214, 204 S. W. 317, 15 A. L. R. 1261 (1918). It is submitted that this settled rule will not be changed by the revision of the statutes. The provision for transfer of parental authority has been retained without change in the new statutes. The dangers of allowing a parent to retain custody of a child and yet force another, who intended to adopt only as an heir, to support the child, are well pointed out in the principal case. The retention of the parts of the statute allowing transfer of authority indicate a legislative intention to have adoption as a legal heir give only the rights of a lawful child as to inheritance and property.

R. W. McD.

**AGENCY—FRAUDULENT OVERISSUE OF STOCK OF PRIVATE CORPORATION BY PRESIDENT—DUTY OF PURCHASER TO USE CARE IN PURCHASING FROM OFFICER SIGNING CERTIFICATE.**—Sterling, president of defendant corporation, offered to sell to plaintiff some of his stock in the corporation. Plaintiff inquired as to Sterling's standing and found it satisfactory, but did not inquire as to the amount of stock Sterling had in the corporation or whether it was pledged. The next day Sterling offered to him a newly-issued certificate



for 50 shares issued to plaintiff, which plaintiff accepted. The certificate stated that the stock was transferable only on the books of the corporation. It was an overissue, and had been fraudulently made out by Sterling after securing the signature of the secretary to a certificate blank. *Held*, the certificate was fictitious and void, and plaintiff could not recover from the company the value of the stock. *Williams v. Terminal Hotel Co.*, 280 S. W. 505 (Tex. Comm. App., 1926).

The stock certificate in suit was absolutely void, being an overissue. *N. Y., Etc., Railway v. Schuyler*, 34 N. Y. 30 (1865); 1 COOK, CORPORATIONS, 8th Ed., Secs. 291, 426; 2 MORAWETZ, PRIVATE CORPORATIONS, 2d Ed., Sec. 761. But was the company estopped from denying responsibility for the act of its president in fraudulently delivering an apparently valid certificate? Where an agent who is authorized to execute bills of lading or issue stock issues a fraudulent bill of lading or stock certificate, regular on its face, the principal is now generally held liable to respond for any damage which an innocent third party has suffered in reliance upon the fraudulent instrument. *Bank of Batavia v. Railway*, 106 N. Y. 195 (1887); *N. Y., Etc., Railway v. Schuyler*, 34 N. Y. 30 (1865) (the rule of these cases has been adopted either by statute or decision in a majority of states); *Cotton Oil Co. v. Lufkin Bank*, 79 S. W. 651 (Tex. Civ. App., 1904); 1 COOK, p. 980. *Contra*: *Friedlander v. T. & P. Railway*, 130 U. S. 416 (1888). The basis of the rule is "estoppel by assisted misrepresentation." 5 COL. L. REV. 456; EWART, ESTOPPEL, pp. 496-512. But the principal case attempts to limit the doctrine by holding that where the purchaser receives stock issued to him in a transaction in which the issuing officer is *personally* interested, the corporation is not liable to the defrauded purchaser. Authorities relied on are *Moore v. Citizens Nat. Bank*, 111 U. S. 156, 28 L. Ed. 385, 4 S. Ct. 345 (1884); *Farrington v. South Boston Railway*, 150 Mass. 406, 23 N. E. 109, 5 L. R. A. 849, 15 Am. St. Rep. 222 (1890) (overruling *Craft v. So. Boston Railway*, 150 Mass. 200, 22 N. E. 917, 5 L. R. A. 716, 15 Am. St. Rep. 185 (1889)). The reason given in the *Moore Case* is that the company owes the purchaser no duty to see that cancellation of an outstanding certificate is made at the time of issuing a new one, because the purchaser sees from the face of the certificate ("transferable only on the books of the corporation") that the old certificate must be canceled in order for the new one to be valid. It is questionable whether the purpose of that provision is to impose upon the purchaser the duty of seeing that the transfer by the company is properly made, and throw on him the burden of loss if it is not. The provision means simply that the company officially recognizes as stockholders, pays dividends to, and gives voting privileges to, only those whose names appear on its books. *Bank of Montgomery v. Bank of Navasota*, 145 S. W. 691 (1912); 2 COOK, Secs. 379, 381, 382. The statement of the *Moore Case* is clearly too broad, since a bona fide purchaser of a fraudulently issued certificate, not purchasing from one of the issuing officers, is protected. *Baker v. Wasson*, 59 Tex. 140 (1883); *Fifth Avenue Bank v. Ferry Co.*, 137 N. Y. 231, 33 N. E. 378, 19 L. R. A. 331, 33 Am. St. Rep. 712 (1893). The contrary doctrine, that it is the duty of the company to see that the transfer is properly made, is asserted in several cases. *Cincinnati Railway v. Citizens Nat. Bank*, 56 Ohio St. 351, 43 L. R. A. 777 (1897); *Bank of Kentucky v. Schuylkill Bank*, 1 PARSONS EQ. CAS. 180 (Pa.). The ground of decision stated by the Massachusetts court in the *Farrington Case* seems more accurate: that it is a safer and more reasonable rule to hold that one dealing *personally* with an officer empowered to sign a certificate or other security, before accepting the certificate, should investigate the validity of its issue. But this rule is based on the proposition that the officer's interest in the transaction is adverse to that of the corporation, disqualifying him from

representing the corporation. Otherwise, of what is the purchaser put on notice? The fallacy is apparent when it is observed that if the officer profits in the transaction, it will not be at the expense of the company, and that the deal gives him little, if any, more opportunity for defrauding the company than he would have in several situations where the purchaser is protected; for example, where the officer issues the certificate in his own name and indorses it to the purchaser, or issues it to a confederate for negotiation to the purchaser.

Of whom would the purchaser inquire as to the validity of the certificate? How much investigation is required to protect him? If no amount of investigation short of finding out the facts is sufficient, the purchaser from an issuing officer is made an insurer of the validity of the certificate he takes. The basic question is, who is in the better position to know the facts and guard against the risk, the corporation, or the purchaser? Several cases under almost identical situations hold the corporation liable. *Tome v. Parkersburg Railway*, 39 Md. 36, 17 Am. Rep. 540 (1873) (certificate did not recite "transferable only on the books of the corporation"); *Cincinnati Railway v. Citizens Nat. Bank*, 56 Ohio St. 351, 43 L. R. A. 777 (1897); *Davey v. Newell-Morse Co.*, 154 S. W. 147 (Mo., 1913); *Nat. Bank v. Newell-Morse Co.*, 168 S. W. 699 (Mo., 1914) (certificates issued in the defrauding officer's name and indorsed to plaintiff). These cases are no doubt based on the feeling that it is contrary to business usage to throw on a purchaser the duty of protecting himself by further inquiry or inspection of the company's books, when presented with a properly-executed certificate by the very officer whom the corporation has appointed to validly execute its stock. This consideration might well have been controlling in the principal case.

V. E.

**APPEAL AND ERROR—EFFECT OF RECENT AMENDMENT PROVIDING FOR APPEAL FROM ORDER GRANTING NEW TRIAL, AND OMITTING PROVISION FOR WRIT OF ERROR.**—The omission from Art. 2078, REV. CIV. STAT. 1911 (Art. 2249, REV. CIV. STAT. 1925) of the provision for writ of error "from every final judgment . . ." does not have the effect of making the writ of error no longer available as a means of review. *Chapman v. Morrison*, 278 S. W. 236 (San Antonio Civ. App., 1925); *Humble Oil & Refining Co. v. Andrews*, 279 S. W. 300 (Eastland Civ. App., 1925); *Globe Indemnity Co. v. Barnes*, 280 S. W. 275 (Amarillo Civ. App., 1926); *Chancey v. Dayton-Goose Creek Ry. Co.*, 280 S. W. 843 (Galveston Civ. App., 1926); *Hofheinz v. Wilson*, 281 S. W. 273 (Austin Civ. App., 1926).

This omission was not a change made by the codifying commission in preparing the revision of 1925, but was an amendment made in the Senate during the consideration of a measure amending Article 2078 so as to provide for an appeal from an order granting a new trial. GEN. LAWS OF TEXAS, 1925, c. 18, p. 45. In the House the bill (H. B. No. 20) was amended so as to provide only an appeal from an order granting a new trial, instead of both appeal and writ of error, as originally drawn. HOUSE JOUR., 39TH LEG., p. 136. In the Senate the bill was further amended, so as to provide only for appeal, either from any final judgment or from an order granting a new trial, but the caption, instead of reciting "An Act to repeal authorization of the use of writ of error, and to provide for appeal from an order granting new trial," was amended so as to read simply "An Act to . . . provide for appeals from orders granting motions for new trials." SENATE JOUR., 39TH LEG., p. 374. No attempt seems to have been made to repeal the subsidiary provisions regulating use of writs of error, found in Arts. 2255-2268, REV. CIV. STAT. 1925, and in articles where "plaintiff in error" is mentioned, such as Art. 2252.

In each of the five cases cited, the decision is based on the unconstitutionality of the amending act, in that it fails to announce in its caption the intention of the legislature to take away the right of review of judgments by writ of error. TEX. CONST., Art. 3, Sec. 35. Mention is made by each court that all other statutory provisions as to writs of error and procedure of plaintiffs in error are retained intact.

The new provision has been held not to authorize appeals from orders granting new trials where such new trial is granted before judgment. *Railway v. Thomason*, 280 S. W. 325 (Tex. Civ. App., 1926); *Cortimeglia v. Herron*, 281 S. W. 305 (Tex. Civ. App., 1926). These decisions very greatly limit the scope of the new provision, as in most cases the verdict of the jury is set aside and a new trial granted before judgment is rendered. None of the courts have yet definitely on its constitutionality.

V. E.

CARRIERS—AEROPLANES AS COMMON CARRIERS.—The owner of a hydroplane operated on irregular schedule, at his pleasure, carrying only white people in groups of three or more at a specified charge. Held, that he was not a common carrier within the terms of an insurance policy. *Brown v. Pac. Mutual Life Ins. Co. of Calif.*, 8 Fed. (2d) 996 (C. C. A. 5th, 1925).

The principal case applies the generally recognized test, that in order to constitute a common carrier of passengers there must be such a holding out to the public to carry all who apply, to the extent of the holding out, as would subject the carrier to an action for a refusal to carry. HUTCHINSON ON CARRIERS, 3d Ed., Sec. 47, 48 and 62. A different view was indicated in the leading case of *Gordon v. Hutchinson*, 1 Watts & S. 285, 37 Am. Dec. 464 (Pa., 1841), where it was held that there need be no public holding out to carry all who might apply, but that a contract to carry in one particular instance might subject the person carrying to the liability of a common carrier. This view has found scant support in other jurisdictions and cannot be justified on principle. The test enunciated by *Gordon v. Hutchinson*, *supra*, was approved and applied in *Chevalier v. Straham*, 2 Tex. 115, 47 Am. Dec. 639, 641 (1847), holding that all persons who transport goods from place to place for hire, for such persons as see fit to employ them, whether usually or occasionally, whether as a principal or an incidental and subordinate occupation, are common carriers. Under the facts of that case apparently no action would have arisen against the carrier if he had refused to carry. In *Hainey v. Baylor*, 18 Tex. 498 (1857), the definition given in *Chevalier v. Straham* was explained, and it was held that although the person was a common carrier at certain seasons of the year, he was not necessarily so when there was no holding out to the public at the particular time of carriage. This qualification of the definition laid down in the *Chevalier Case* seems to bring the Texas law in line with the great weight of authority. In *Burnett v. Riter*, 276 S. W. 347 (Tex. Civ. App., 1925), the public holding out of the carrier was made the test of whether he was a common carrier or not.

The same test should be applied to aeroplanes as to any other carrier. In the principal case had there been a holding out to the public to carry all who applied, the aeroplane would have been a common carrier; but under the facts the case was correctly decided. *North America Ins. Co. v. Pitts*, 104 So. 21 (Ala., 1925).

C. S. E.

CARRIERS—BAGGAGE—LIABILITY OF AUTO BUS OPERATOR FOR LOSS.—Defendant operated autocars between cities, carrying passengers for hire. Plaintiff, a passenger, was told by the driver that he might carry his handbag with him in the car, or the driver would put it in the baggage rack. Plaintiff



turned the bag over to the driver, who placed it in a rack on the running board. The baggage caught fire enroute and was burned. Plaintiff sued for its value. *Held*, that, although defendant was a common carrier of passengers, he was not an insurer of baggage, but liable only as bailee, for negligence. *Burnett v. Riter*, 276 S. W. 347 (Tex. Civ. App., 1925).

That defendant was a common carrier of passengers is evident. *Bower Auto Rent Co. v. Young*, 274 S. W. 295 (Tex. Civ. App., 1925. Writ of error refused); 10 C. J. Sec. 1. While a common carrier of passengers who undertakes to carry their baggage is liable as an insurer for loss of, or injury to, such baggage unless due to act of God, public enemy, negligence of the owner, or inherent qualities of the baggage, *Mex. Cent. Ry. v. De Rosear*, 109 S. W. 949 (Tex. Civ. App., 1908); *Hollister v. Nowlen*, 19 Wend. 234 (1838); yet to impose this degree of liability, the baggage must be delivered into the custody of, and be under the complete or exclusive control of the carrier. *Mex. Cent. Ry. Co. v. De Rosear*, *supra*; *Seasongood v. R. R.*, 14 Ky. L. R. 430 (1892); HUTCHINSON, CARRIERS, 3d Ed., Sec. 1241, 1257. Where the property remains wholly or partly in the personal custody of the passenger, the carrier is liable for negligence only. *Bonner v. Grumbach*, 2 Tex. Civ. App. 482, 21 S. W. 1010 (1893); *M., K. & T. Ry. v. Kirkpatrick*, 165 S. W. 500 (Tex. Civ. App., 1914). A different rule prevails in England, followed by some American decisions, where the carrier is held as an insurer in all cases except where possession in the passenger is exclusive. *Le Conteur v. Ry.*, L. R. 1 Q. B. 54, 6 Best & S. 961 (1865); *Ry. v. Lillie*, 112 Tenn. 331, 78 S. W. 1055, 105 Am. St. Rep. 947 (1904). In a recent Washington case it was held that a bus or stage line should be under the same rule as a railway company as to liability for loss of passenger's baggage. *Boxley v. Cochrane*, 130 Wash. 323, 226 Pac. 1015 (1924).

The reasoning in the instant case is that, inasmuch as the driver must give his "close attention to the operation of the car," and hence cannot take the baggage into his personal custody, the carrier is not liable as an insurer. But it is not requisite, in order for the carrier to become an insurer, that it have an agent whose peculiar duty is to tend the baggage. *Hollister v. Nowlen*, *supra*. Nor does the fact that the passenger accompanies the baggage affect the carrier's liability. *Hollister v. Nowlen*, *supra*. The court apparently holds, as matter of law, that baggage in the case of all auto busses is not in the exclusive control of the carrier. It is submitted that this rule is too broad, and that the question should be one of fact for the jury, depending on the facts in each particular case. *Dawley v. Wagner Palace Car Co.*, 169 Mass. 315, 47 N. E. 1024 (1897).

W. A. M., Jr.

CONSTITUTIONAL LAW—REVOCATION OF LICENSE OF FOREIGN CORPORATION TO DO BUSINESS IN THE STATE FOR VIOLATION OF UNCONSTITUTIONAL STATUTE.—Foreign insurance corporations sought to restrain the insurance commissioner from enforcing an order that the licenses of foreign insurance corporations that violated the terms of REV. CIV. STAT. 1925, Arts. 5058 and 5060, by paying non-resident agents any part of the commission secured for insurance of property situated within the state, would be revoked. One of the grounds urged for the granting of the injunction was that the statutes were in violation of the Fourteenth Amendment to the Federal Constitution. *Held*, that the license of a foreign corporation may be revoked for violation of a state statute, even though the statute be repugnant to the federal constitution. *Scott v. Smelker & Co.*, 280 S. W. 297 (Tex. Civ. App., 1926). (Writ of error granted, March 17, 1926.)

It has been held that a state can arbitrarily exclude a foreign corporation unless it is engaged in interstate commerce or performing some governmental



function, and hence, subject to these limitations, can impose any requirements for admission that it may choose. *Hooper v. California*, 155 U. S. 648, 39 L. Ed. 297, 15 Sup. Ct. 207 (1895); BURDICK, THE LAW OF THE AMERICAN CONSTITUTION, p. 484. The right of the state to impose restrictions on foreign corporations, however, is being continually narrowed. It was early decided that an agreement made at the time the corporation was admitted, that it would not remove suits brought in the state courts to the federal courts was void as an attempt to oust the federal courts of jurisdiction. *Barrow S. S. Co. v. Kane*, 170 U. S. 100, 42 L. Ed. 964, 18 Sup. Ct. 526 (1898). But the Supreme Court recognized the power of a state to revoke the license of a foreign corporation if it removed a suit to the federal courts. *Security Mutual Ins. Co. v. Prewitt*, 202 U. S. 246, 50 L. Ed. 1013, 26 Sup. Ct. 619 (1906). In a more recent case, however, it held such a condition invalid on the ground that it infringed the constitutional right of the corporation to resort to the federal courts. *Terral v. Burke Construction Co.*, 257 U. S. 29, 66 L. Ed. 352, 42 Sup. Ct. 188, 21 A. L. R. 186 (1921). It has also been decided that a state cannot revoke the license of a corporation for failure to pay a tax which was beyond the power of the state to levy. *Western Union Telegraph Co. v. Kansas*, 216 U. S. 1, 54 L. Ed. 355, 39 Sup. Ct. 190 (1909).

A New Mexico statute similar to the statute involved in the principal case was held repugnant to the Fourteenth Amendment, and the power of the state to revoke the license of a foreign insurance company for its violation was denied in a recent decision of the Supreme Court. *Fidelity & Deposit Co. of Maryland v. Tafoya*, 46 Sup. Ct. 331 (1926). The Texas statute, if it reaches the Supreme Court, will undoubtedly suffer the same fate. It is difficult to see how an unconstitutional statute can furnish any basis for revoking the license of a foreign corporation, since such a statute is as "inoperative as if it had never been passed." *Norton v. Shelby County*, 118 U. S. 425, 30 L. Ed. 178, 6 Sup. Ct. 1121 (1888). The right of the state to exclude a foreign corporation is subject to the limitation that the power cannot be exercised to accomplish a forbidden result.

J. L.

CRIMINAL LAW—CONSTRUCTION OF STATUTES—INDEFINITENESS.—Plaintiff's car was struck by one of defendant's trains at a crossing and plaintiff sued for damages. Defendant raised the issue of contributory negligence, alleging that plaintiff had violated the terms of the Acts of 1917, Chapter 207, Section 17, prohibiting approach to obscured railroad crossings at a speed greater than six miles an hour. Held, that the statute imposed no duty on plaintiff, being void for indefiniteness. *International G. N. Ry. v. Mallard*, 277 S. W. 1051 (Tex. Comm. App., 1925), *Galveston & S. A. Ry. Co. v. Duty*, 277 S. W. 1057 (Tex. Comm. App., 1925).

Penal statutes should define with reasonable certainty the acts prohibited or required. *State v. International G. N. Ry.*, 107 Tex. 349, 179 S. W. 867 (1915). A statute not explicit enough to inform those subject to it what conduct is covered by its terms is repugnant to the due process clause of the Federal Constitution, *Connally v. General Construction Co.*, 70 L. Ed. 163, 46 Sup. Ct. 126 (U. S., 1925), and would deny the right given in the constitution of Texas, Art. 1, Sec. 10, to persons accused of crime to know the character of the charge against them, and is void. *Ex parte Slaughter*, 92 Tex. Cr. Rep. 212, 243 S. W. 478 (1922); *Augustine v. State*, 41 Tex. Cr. Rep. 59, 52 S. W. 77, 96 Am. St. Rep. 765 (1899). If the law is reasonably intelligible, it should be upheld. *State v. T. & P. Ry.*, 106 Tex. 18, 154 S. W. 1159 (1912). Laws are void for uncertainty that prohibit the use of bright headlights that seriously impair the vision of drivers in other cars, *Griffin v. State*, 86 Tex. Cr. Rep. 498, 218 S. W. 494 (1920), provide punishment for labelling feed-

stuff as of *substantially greater* food value than is justified, *Cogdell v. State*, 81 Tex. Cr. Rep. 66, 193 S. W. 675 (1917), and impose speed limits to be observed only in *closely built up* neighborhoods, *Ex parte Slaughter, supra*. All methods of committing an offense need not be specified, provided there is no real ambiguity. Thus, it is not essential that all methods of *falsely packing* a bale of cotton be enumerated, *Ex parte Montgomery*, 86 Tex. Cr. Rep. 636, 218 S. W. 1042 (1920), or all methods of giving a check without funds in bank or good reason to believe that it will be paid. *Krueger v. State*, 82 Tex. Cr. Rep. 404, 199 S. W. 629 (1917). Statutes are not invalid for failure to define terms that have a definite technical meaning, *Hygrade Provision Co. v. Sherman*, 266 U. S. 497, 69 L. Ed. 402, 45 Sup. Ct. 141 (1925), or a definition at common law, *Waters-Pierce Oil Co. v. Texas*, 48 Tex. Civ. App. 162, 106 S. W. 918 (writ of error refused), 212 U. S. 86, 53 L. Ed. 417, 29 Sup. Ct. 220 (1909).

What is indefinite seems to be largely a matter of taste and degree. Some jurisdictions uphold requirements that motorists use reasonable care with reference to the density of traffic, character of neighborhood, etc., *Commonwealth v. Pentz*, 143 N. E. 322 (Mass., 1924); *State v. Goldstone*, 144 Minn. 405, 175 N. W. 892 (1920); *Ex parte Daniels*, 183 Cal. 638, 192 Pac. 442 (1920); *Maxon v. State*, 177 Wis. 319, 187 N. W. 753 (1922). In these jurisdictions, the plea that the statute involved in the principal case is void for uncertainty would probably be rejected. In statutes other than traffic regulations, the Texas courts have been more lenient. In the Water Closet Act with regard to railroads, the general terms *reasonable cleanness*, *reasonable sanitation*, *reasonable light*, do not render the enactment void, the court laying down the doctrine that no more certainty is required than is practical with reference to the subject matter of the statute, *State v. I. & G. N. Ry., supra*.

J. C.

**CRIMINAL LAW—ROBBERY.**—Saunders won Fisher's money by the use of marked cards, the latter retook it by force. *Held*, that one cannot be guilty of robbery by taking his own specific property from the possession of another who has acquired it unlawfully, although the taking may be accomplished under such circumstances as would amount to robbery if the property belonged to the person from whom it was taken. *Fisher v. State*, 277 S. W. 386 (Tex. Cr. App., 1925).

The essential elements of robbery consist of force or violence, fraudulent intent to appropriate the property and that it must belong to one other than the taker. *Glenn v. State*, 49 Tex. Cr. Rep. 349, 92 S. W. 806, 13 ANN. CAS. 774 (1906). If a card game is used as a false pretext to obtain possession of money it is theft under Art. 1413 PEN. CODE 1925. *Conner v. State*, 76 S. W. 924 (Tex. Cr. App., 1903). One induced to part with his money by false pretext has lost no right to its control. *Temple v. State*, 86 Tex. Cr. Rep. 219, 215 S. W. 965 (1919). A retaking of one's own property by force is not robbery. *Barnes v. State*, 9 Tex. App. 128 (1880). It would be robbery if the money had been delivered peacefully according to the rules of the game, and it is retaken by force. *Blain v. State*, 34 Tex. Cr. Rep. 448, 31 S. W. 368 (1895).

In *Carroll v. State*, 99 Tex. Cr. Rep. 30, 57 S. W. 99 (1900), under similar circumstances to those in the principal case, the money having been won unfairly and delivered to the possession of the winner, it was held that a retaking by force was a robbery, for within the meaning of the law the winner was the owner. This decision is possibly more in accord with the evolution of the law but under the construction of our statutes, the decision in the principal case is correct and the rule is well established in this state. Our

court went so far as to hold in *Barton v. State*, 88 Tex. Cr. Rep. 368, 227 S. W. 317, 13 A. L. R. 147 (1921), that a creditor who collects his debt by force is not guilty of robbery, for a bona fide claim might negative the intent to steal which is an essential element of robbery; and this holding is in accord with the weight of authority. Note, 13 A. L. R. 151.

While it may be questioned whether the policy of the law should be to excuse one to this extent who in the use of self help, employs force to retake property that he has peaceably delivered to another, the punishment should be measured by the assault and battery statute, and not by the one defining robbery.

A. J. E.

EMINENT DOMAIN—RESTRICTIVE COVENANT NOT A PROPERTY RIGHT WITHIN THE MEANING OF ARTICLE 1, SECTION 17, OF THE CONSTITUTION.—The city of Houston condemned two lots in a restricted residential section of the city for the purpose of erecting a fire station. An action was brought by the other lot owners in the same addition to restrain the city from building until the right created by the restrictive covenants had been condemned. *Held*, in denying the injunction, that condemnation proceedings were not necessary in the present case because: (1) the covenants having been entered into with knowledge of the city's power of eminent domain, the city was impliedly excepted from the effect thereof, and no property right was created; (2) that if a property right were created it was not such that the seizure of it would be a taking within the meaning of Art. 1, Sec. 17, of the Constitution; (3) that the covenants so far as they attempted to restrict the right of the city to condemn were void as against public policy. *City of Houston v. Wynne et al.*, 279 S. W. 916 (Tex. Civ. App., 1926). Writ of error refused.

The early view was that a restrictive covenant created only a personal right. 33 HARV. L. REV. 813. The modern view is that such a covenant creates an interest in land which comes within the statute of frauds. *Babb v. Miller*, 263 S. W. 253 (Tex. Comm. App., 1924) (where the court treats a restrictive covenant as an easement); 3 TEXAS LAW REVIEW 101.

The right of the city to take the property after condemnation is not questioned in the present case, nor could it be successfully, for all property is held subject to the power of eminent domain. *Brimmer v. Boston*, 102 Mass. 19 (1869). For that reason the third point made by the court is not applicable to the present case. There is some conflict of authority as to whether a restrictive covenant can be violated by a city without compensation. Such a covenant was held to create a property right which must be condemned before it could be violated in *Allen v. City of Detroit*, 167 Mich. 464, 133 N. W. 317, 36 L. R. A. (N. S.) 890 (1911); *Ladd v. City of Boston*, 151 Mass. 585, 24 N. E. 858 (1890). The rule of the federal court is that the state, before the making of the covenant, would have the power to take the land by condemning the fee, and that the placing of this additional burden upon the land does not require that the holder of the new interest be compensated. *In re Newlin*, 112 Fed. 622 (1899). It has been decided in Texas that the violation of a "natural right" to freedom from invasion of noise, etc., from neighboring land is not a taking within the meaning of Art. 1, Sec. 17, of the Constitution. *McCammon & Lang Lumber Co. v. Railroad*, 104 Tex. 8, 133 S. W. 247, 36 L. R. A. (N. S.) 662, ANN. CAS. 1913E 870 (1911). A contrary doctrine has been announced by some courts. *Theobald v. Railroad*, 66 Miss. 279, 6 So. 230 (1889); *Railway v. Fuller*, 63 Tex. 467 (1885). In the absence of a "taking" of property there is no requirement that compensation be made in advance. *Stetson v. Chicago, Etc., Ry.*, 75 Ill. 74 (1874). It may be that the violation of a restrictive covenant is more analogous to a "damaging" than to a "taking." If so, the city's



liability, if any, was to pay after the infliction of the damage, and the injunction was correctly denied. In holding that there was no property right created because the covenants were entered into in contemplation of the city's power of eminent domain, the court seems to have confused the ability to create a new compensable interest in property and the ability to divest the city of its power of eminent domain. The latter cannot be done even by covenants to which the city itself is a party. *Brimmer v. Boston*, *supra*. There seems to be no reason why the former should not be done, for leases, terms for years, and improvement are all created in contemplation of the power of eminent domain, but it would not be contended that such interests could be taken without condemnation. It is believed that the decision of the present case can be rested only upon the ground that the property right created by a restrictive covenant is not such, the seizure of which, constitutes a "taking" within the meaning of Art. 1, Sec. 17 of the State Constitution.

J. D.

**EVIDENCE—ADMISSION—SPECIAL FINDINGS IN FORMER SUIT AS ADMISSIONS.**—Special findings in a suit of trespass to try title were in accordance with the contentions of the interveners that a former owner had acquired title by limitations from one who was admittedly a superior grantee. Judgment was entered thereon for the interveners. In a subsequent suit of trespass to try title involving the same property, the interveners of the former suit were defendants and claimed, not only under the title by limitations, which was the common source, but also under the superior grantee whose title had been shown by the former suit to have been divested by limitations. Plaintiffs offered the special verdict of the prior case as an admission of the defendants. *Held*, that the evidence was admissible, not upon any principle of estoppel or res adjudicata, but "as an ordinary admission of a party against interest." *Campbell v. McLaughlin*, 280 S. W. 189 (Tex. Comm. App., 1926).

The quoted phrase tends to obscure the distinction between the admissions of a party, which, as is well illustrated by the principal case, comprise all statements of a party though favorable to the party's interest when made, and declarations against interest, which are required to be against the interest of the declarant when made. *State v. Anderson*, 10 Ore. 448 (1882); *WIGMORE, EVIDENCE*, 2d Ed., Sec. 1048. The evidence in the principal case comes in, if at all, as the admission of a party. Is it such?

The pleadings in prior causes have long been treated as admissions of a party and as admissible as such in later actions. *Wheeler v. Styles*, 28 Tex. 240 (1866); *Buzard v. McAnulty*, 77 Tex. 438, 14 S. W. 138 (1890). This is also true of abandoned pleadings in the same case even though they are not sworn to or signed. *Barrett v. Featherstone*, 89 Tex. 567, 35 S. W. 11, 36 S. W. 245 (1896); *Houston, Etc., R. Co. v. De Walt*, 96 Tex. 121, 70 S. W. 531, 97 Am. St. Rep. 877 (1902).

A more analogous situation to that of the principal case may be found in those cases where the testimony of witnesses offered by the party is held usable in a subsequent suit against the party as his admission. *Knapp v. Brotherhood of American Yeoman*, 149 Iowa 137, 126 N. W. 336 (1910); *Becker v. City of Philadelphia*, 217 Pa. 344, 66 Atl. 564 (1907); 38 HARV. L. REV. 262. The situations are analogous because in both the question is: are the assertions offered those of the party against whom they are offered? If so, there is no doubt that they are admissions and usable as such. In *Becker v. City of Philadelphia*, *supra*, the court says: "Dr. Cooper was a witness testifying on behalf of the plaintiff. The plaintiff was present at the time he testified according to her own admission. She relied upon his testimony with regard to the nature and extent of her injury, as furnishing a basis upon which she asked the jury to reckon her compensation. She thus adopted and



used the declarations and admissions of the witness as her own, and it was the same as though she herself had asserted the fact, which they tended to prove." Thus the assertion is considered that of the party by adoption. WIGMORE, EVIDENCE, 2d Ed., Sec. 1073. The same principle may be applied to the situation in the principal case. The interveners did not render the verdict. But the facts of verdict were found in accordance with their contentions. The interveners procured the findings in the verdict and secured a judgment thereon. The assertions in the verdict were thereby adopted by the interveners as their own and were usable against them in another suit as admissions. *Thornell v. Ins. Co.*, 229 S. W. 653, 249 S. W. 203 (Tex. Comm. App., 1923).

H. T. M.

EVIDENCE—CRIMINAL LAW—APPORTIONMENT OF BURDEN OF PROOF.—The evidence disclosed that the defendant was transporting liquor, but he testified that he was conveying it for medicinal purposes. *Held*, that the burden was on the state to prove beyond a reasonable doubt that the liquor was not being transported for medicinal purposes. *Carrier v. State*, 99 Tex. Cr. Rep. 663, 271 S. W. 383 (1925).

Assuming that the value of any rule of evidence is measured by the practicality of the results it attains in varying situations, it seems impossible to establish a universal *a priori* test for determining upon whom the risk of non-persuasion should rest. If the test is whether the matter is affirmative or negative, then by mere grammatical arrangement, a party can be relieved of his burden. *Berty v. Dormer*, 12 Mod. 526 (Eng., 1701). That the party has the burden of persuasion as to every material ingredient of his case, *Dickson v. Evans*, 6 Term R. 57 (Eng., 1794), merely sets the inquiry back one step, to ascertain what constitutes a material ingredient. Though the burdens of persuasion and of pleading usually coincide, the rule placing the burden of persuasion on the party having the burden of pleading, *Brown v. Kendall*, 6 Cush. 292 (Mass., 1850), is not always borne out by the decisions. Under a plea of non assumpsit, or not guilty in an action on the case, an affirmative defense may be introduced. The test which places the risk of non-persuasion on the party having a peculiar knowledge of the facts, deserves some consideration. *King v. Turner*, 5 Maule & S. 206 (Eng., 1816) (criticized in *Lisbon v. Lyman*, 49 N. H. 553 (1870)). But this is not uniformly applied either, for in malicious prosecution cases the plaintiff has the burden of showing a lack of probable cause. No doubt these variances are justifiable on the bases of policy and convenience.

In Texas criminal prosecutions the defendant has the burden to "establish" his affirmative defenses. PENAL CODE 1925, Art. 52. "Establish" is susceptible, either to the construction that the defendant should only have the burden of first going forward with the evidence on such defensive issue if he wishes to raise it; or, that he should have the burden of persuading the mind of the jury. WIGMORE ON EVIDENCE, Secs. 2485, 2487. But the broad language used in construing the statute that, "when the defendant relies upon any substantive distinct, separate and independent matter as a defense, which is outside of, and does not necessarily constitute a part of the act or transaction with which he is charged, \* \* \* it devolves upon him to establish such special and foreign matter by a *preponderance* of the evidence," seems clearly to impose upon the defendant the risk of non-persuasion. *Jones v. State*, 13 Tex. Ct. App. 1 (1882). This appears to be the meaning of "burden of proof" as used in the decisions relating to some defenses. *Buri v. State*, 38 Tex. Cr. Rep. 397, 40 S. W. 1000, 43 S. W. 344 (1897); *Newman v. State*, 99 Tex. Cr. Rep. 363, 269 S. W. 440 (1924) (Insanity); *Coy v. State*, 75 Tex. Cr. Rep. 85, 171 S. W. 221 (1914) (Mistake of fact, in prosecution for

bigamy); *Ellis v. State*, 30 Tex. Cr. Rep. 601, 18 S. W. 139 (1892) (Non-age in a murder case); *Richards v. State*, 97 Tex. Cr. Rep. 448, 261 S. W. 587 (1924) (Illegality of the transfer of the case to another court); *O'Connor v. State*, 28 Tex. Cr. Rep. 288, 13 S. W. 14 (1889) (Former jeopardy); *Willis v. State*, 24 Tex. Cr. Rep. 586, 6 S. W. 857 (1888) (Former conviction); *Ex parte Johnson*, 30 Tex. Cr. Rep. 279, 17 S. W. 410 (1891) (Facts justifying release from custody on bail).

However, in respect to many instances which seem to be alluded to as affirmative defenses, defendant is held not to have the burden of persuasion, but is only required to present sufficient evidence to raise an issue. *Gilbert v. State*, 78 Tex. Cr. Rep. 441, 181 S. W. 200 (1915) (Lawfulness of the restraint, in false imprisonment); *Bedford v. State*, 44 Tex. Cr. Rep. 97, 69 S. W. 158 (1902) (That the pistol was unloaded, in a prosecution for assault, under the old law); *Smith v. State*, 18 Tex. Ct. App. 69 (1885) (Compliance with the law, in a prosecution for selling insurance for an unauthorized company); *Sigler v. State*, 17 Tex. 304 (1856) (Justification for breach of duty to repair road); *Ashcroft v. State*, 32 Tex. 109 (1869) (Compliance with the law, in taking up an estray); *Wagner v. State*, 80 Tex. Cr. Rep. 66, 188 S. W. 1001 (1916) (Statutory exemption for carrying a pistol); *Collins v. State*, 68 Tex. Cr. Rep. 354, 152 S. W. 1047 (1913) (Seemingly, that he had a license); *Bridges v. State*, 8 Tex. Ct. App. 145 (1880) (Lawful disposition of property in prosecution for embezzlement); *Goforth v. State*, 92 Tex. Cr. Rep. 200, 241 S. W. 1027 (1922) (Lack of knowledge that he struck anyone, in prosecution for failure of motorist to stop); *Simpson v. State*, 93 Tex. Cr. Rep. 303, 247 S. W. 548 (1923) (Previous unchaste character of female, in rape prosecution, but this not an element of the state's case, PENAL CODE 1925, Art. 1183, and would seem to fall within the definition given below of an affirmative defense); *Bell v. State*, 62 Tex. Cr. Rep. 242, 137 S. W. 670 (1911); *Dozier v. State*, 62 Tex. Cr. Rep. 258, 137 S. W. 679 (1911) (Justification for selling liquor in a county prohibited by local option); *Newton v. State*, 98 Tex. Cr. Rep. 582, 267 S. W. 272 (1924) (Legality of possession of liquor where possession of more than one quart is shown).

Construing an "affirmative defense" to be one setting out matter entirely new and disjointed from the elements of the crime, such as insanity, non-age, and mistake of fact, the foregoing decisions seem reconcilable with such a classification save perhaps in the case of chaste character in rape. The rule requiring the risk of non-persuasion to follow the burden of pleading is also invoked in special pleas, such as former jeopardy, which are affirmative defenses, and special proceedings, such as those brought to obtain bail. Obviously defenses negating the unlawfulness of the defendant's act are not within the definition of affirmative defenses, and such seems the character of the present case, which is not only amply supported by authority, *Walker v. State*, 97 Tex. Cr. Rep. 547, 262 S. W. 759 (1924); *Clevenger v. State*, 96 Tex. Cr. Rep. 23, 255 S. W. 622 (1923), but has been followed by more recent decisions, *Garcia v. State*, 273 S. W. 856 (Tex. Cr. App., 1925); *Robison v. State*, 276 S. W. 259 (Tex. Cr. App., 1925). In such cases the state is not required to negative the exceptions to the crime in the indictment. *Walker v. State*, *supra*.

Whether or not the construction of the statute and classification of the decisions suggested, is correct, it is certain that some unifying principle should be found and announced by the court, if constant confusion of the two meanings of "burden of proof" and frequent reversals are to be avoided.

J. W. M., Jr.

**HUSBAND AND WIFE—COMMUNITY PROPERTY—THE EFFECT OF THE AMENDMENTS ON THE HUSBAND'S SEPARATE PROPERTY.**—In a suit by the husband for divorce, the wife, in a cross action, sought to recover a community interest in the interest collected by the husband on certain promissory notes, held by him as his separate property during the existence of the marriage relation, as well as a community interest in rents and revenues arising from lands of the husband. *Held*, that this was community property and that the wife was entitled to her community interest. *Willcut v. Willcut*, 278 S. W. 236 (Tex. Civ. App., 1925).

The court based its decision, in part, upon the fact that the statute defining the husband's separate property did not include the increase or revenue from his personal property. Art. 4621 VERNON'S ANN. CIV. STAT. SUPP. 1918 (now Art. 4613 REV. CIV. STAT. 1925). Also, since the provision making rents and revenues from the wife's separate lands her separate property is unconstitutional, *Arnold v. Leonard*, 273 S. W. 799 (Tex. Sup. Ct., 1925), a similar provision concerning the rents and revenues from the husband's separate lands is invalid.

There is no constitutional limitation upon the husband's separate property as there is for the wife's. The separate property of the husband was first defined by the legislative Act of March 13, 1848, as, "all property of the husband, both real and personal, owned or claimed by him before marriage and that acquired afterwards by gift, devise, or descent, as also the increase of all lands thus acquired. . . ." (ACTS 2 LEG., REG. SESS., p. 77.) The amendment of March 21, 1913 (ACTS 33 LEG., REG. SESS., p. 61; Art. 4621), did not change the status of the husband's separate property. In 1917 (GEN. LAWS, 36 LEG., REG. SESS., p. 346), Art. 4621 was amended to include the rents and revenues from the husband's separate lands as his separate property. The amendment in 1921 (GEN. LAWS, 37 LEG., REG. SESS., p. 251) did not concern the separate property of the husband. The judicial interpretation of the amendment in 1913 is that the rents and revenues of the separate estate of the husband did not become the separate property of the husband, but community property, and it was not until 1917 that the article was so amended as to make the rents and revenues of the separate property of the husband his separate property. *Gardenhire v. Gardenhire*, 258 S. W. 1077 (Tex. Civ. App., 1923, writ of error dismissed for want of jurisdiction). This construction was not followed by Judge Fly in the principal case.

Though it may be more equitable to measure the stick from the middle and deny an increase to the husband's separate property where it was not allowed to the wife in *Arnold v. Leonard*, it is submitted that the decision in *Arnold v. Leonard* bears no relation to the problem now at hand, as that decision was controlled by the constitutional limitation defining the wife's separate property. The court, in the principal case, apparently overlooked the fact that there was no constitutional limitation upon the husband's separate property, when it said (after city *Arnold v. Leonard*): "If this be the law, appellant is entitled to her community interest in the rents and revenues arising from the lands of the appellee as well as the interest."

An argument has been suggested in support of the decision as to the rents from the husband's lands, that, since the trend of the legislative policy is to increase the wife's separate estate, it could not have been the intention of the legislature to increase the separate estate of the husband if they had known that the provision increasing the wife's separate property would be held unconstitutional. Both provisions were enacted by the amendment in 1917. In order to carry out the legislative intent, it is said, the provisions increasing the wife's separate property having been held unconstitutional, the provision increasing the husband's separate property should also be held invalid. This argument comes unheralded by court decisions or text book writers, and may



be smothered by elementary rules of statutory construction. The plain and unambiguous language of a statute should not be altered by supposed considerations of policy which are not expressed in the statute. *Rudasill v. Rudasill*, 219 S. W. 843 (Tex. Civ. App., 1920); SUTHERLAND ON STATUTORY CONSTRUCTION, p. 419.

Art. 4621, REV. CIV. STAT., 1911, in regard to the husband's separate property is unambiguous, and therefore any attempt of the court to render it invalid seems to raise doubt, uncertainty and confusion where none should exist.

The interest on the husband's promissory notes not having been named in the statute, was correctly held community property in the principal case. 3 TEXAS LAW REVIEW 366; 4 TEXAS LAW REVIEW 161.

D. S.

INSURANCE—EFFECT OF PROVISION IN POLICY NOT CONTAINED IN FORM PRESCRIBED BY INSURANCE COMMISSION—VALIDITY OF "THREE-FOURTHS VALUE" CLAUSE.—The defendant insurance company changed the form prescribed by the insurance commission by inserting a clause releasing the company from liability for damage done to moving picture machines by fire originating within the machines. The property was damaged by fire originating from this source, and the company interposed as a defense this term of the policy. *Held*, that as the restriction of liability was not provided for in the prescribed form, but as a matter of fact, was inconsistent with one provision contained therein, it would be disregarded. The decision also upheld the validity of the "three-fourths value" clause which appeared in the prescribed form. *Commercial Union Assurance Co. v. Preston* (Tex. Comm. App., March 31, 1926) not yet reported.

REV. CIV. STAT. 1925, Arts. 4888 and 4889, make the use of the form prescribed by the insurance commission compulsory, and provide that any change must be made subject to the approval of the commission, which was not secured in this instance. The clause inserted was clearly for the benefit of the insurance company. The holding of the court on this point is in accord with an almost unbroken line of decisions which hold that statutory provisions cannot be waived or altered to the detriment of the insured party. *Chandler v. John Hancock Mutual Fire Ins. Co.*, 180 Mo. App. 394, 167 S. W. 1162 (1914); *First Texas State Ins. Co. v. Smalley*, 111 Tex. 68, 228 S. W. 550 (1921). The insured party, however, will be allowed to take advantage of a term in the policy inconsistent with the prescribed form. REV. CIV. STAT. 1925, Art. 4894, in effect gives the insured an option of holding the company to the terms of the contractual agreement, where it is inconsistent with the prescribed form, or of disregarding the contract and relying on the form prescribed by the commission. *Republic Insurance Co. v. Poole*, 257 S. W. 624 (Tex. Civ. App., 1924).

The "three-fourths value" clause which was upheld restricted the liability of the company to the amount of three-fourths of the value of any item of property destroyed, or of the company's proportion only of three-fourths of the value if additional insurance was secured. The district court and the Court of Civil Appeals held this clause invalid on the ground that it, in effect, was a provision for co-insurance and therefore prohibited by REV. CIV. STAT. 1925, Art. 4891. A co-insurance clause compels the insured to take out insurance to a designated percentage of the value of the property, or else become his own insurer to the amount of the deficiency, bearing his proportion of any loss occurring under the policy. In one sense of the word, a limitation of recovery to three-fourths of the value of the property does compel the insured to become a co-insurer, as part of the risk of loss must remain with him. In insurance parlance, however, a well defined distinction



is made between limitation of liability clauses and co-insurance clauses. *Firemen's Fund Ins. Co. v. Pekor*, 106 Ga. 1, 31 S. E. 779 (1898); RICHARDS ON INSURANCE LAW (3rd Ed.), Sec. 242. It has been held that a statute compelling the use of the three-fourths clause is not in conflict with a statute similar to ours prohibiting co-insurance. *Surface v. Northwestern Ins. Co.*, 157 Mo. App. 570, 139 S. W. 264 (1911). *Milwaukee Mechanics Ins. Co. v. West Development Co.* (Tex. Comm. App., March 31, 1926), decided the same day as the principal case, involved a similar point and was decided the same way.

J. L.

MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—COMPENSATION FOR INJURIES RESULTING FROM HORSEPLAY.—Cassell was a stage hand, and on the night of the accident was at work on the stage. The stage manager sportively snapped a pistol that was part of the theater property at one or two of the persons around him, and then snapped it three times at Cassell. The bullet struck Cassell in the back. *Held*, reversing the Court of Civil Appeals, 243 S. W. 504, the injury was the result of a risk reasonably incidental to the work in which Cassell was engaged, hence originated in the employment, and compensation should be awarded. *Cassell v. U. S. Fidelity & Guaranty Company* (Tex. Comm. App., 1926, not yet reported).

Since Cassell was performing his regular duties at the time and took no part in the horseplay, he was obviously in the course of his employment, and the only question in the case was whether the injury was one "having to do with and originating in the work" within the meaning of Art. 9309, definition 4, REV. CIV. STAT. 1925. This was a case of first impression in Texas. In other states, where the injured employe instigated or took part in the horseplay, compensation has been uniformly denied. *Moore's Case*, 225 Mass. 258, 114 N. E. 204 (1916). Some courts have held that in order to justify compensation there must have been a causal connection between the conditions under which the work was to be performed and the resulting injury, and have construed this narrowly to mean that something in the nature of the work or some act of a fellow employe while engaged at work must be the cause of the injury. *Hulley v. Moosbrugger*, 88 N. J. L. 161, 95 Atl. 1007, L. R. A. 1916C 1203 (1915). Since under this theory no recovery is given for injuries resulting from horseplay, it being considered that horseplay is not caused by the nature of conditions of the work, it is immaterial whether the workman took part in the play or not. But the sounder, and now generally accepted, view seems to be that if the injured employe was taking no part, but was attending to his duties, compensation should be given. *Leonbruno v. Champlain Silk Mills*, 229 N. Y. 470, 128 N. E. 711, 13 A. L. R. 522 note, 540 (1920); *Challis v. Railway* (1905), 2 K. B. 154, 74 L. J. K. B. N. S. 569, 53 Week. Rep. 613, 93 L. T. N. S. 330, 21 Times L. R. 486, 7 W. C. C. 23. The test of liability is said to be the relation of the employment to the risk, whether due to the circumstances of the work the employe is subjected to a risk substantially beyond the ordinary normal risk, and not whether the injury was brought about through some particular part of the work or some particular act of a fellow employe while engaged in work. Injuries resulting from horseplay come within the broader rule, for it is considered that since horseplay is a usual means of diversion where employes are working in close proximity, danger of injury resulting from such play is a necessary and concomitant risk of the employment. *Railway v. Clendennin*, 143 N. E. 303 (Ind. App., 1924); *Matter of Markell v. Green Felt Shoe Co.*, 175 App. Div. 958, affirmed 221 N. Y. 493 (1917). The case for recovery is always stronger where the employer knew it was the custom or habit of the employes to play the particular trick which caused the injury. *Re Loper*,

64 Ind. App. 571, 116 N. E. 324 (1917). Holding that risk of injuries from horseplay is a risk reasonably incident to any employment where several workmen are employed near each other, the Texas court has correctly chosen to follow the line of decision which allows recovery where the injured workman took no part in the play, but was performing his own duties.

V. E.

MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—RECOVERY EXEMPT FROM GARNISHMENT WHEN IN BANK.—Gaddy sued Lee on a debt and sued out a writ of garnishment against the appellee. The latter admitted that it had funds belonging to Lee in its possession, but stated that Lee had informed it that such money had been awarded to him as compensation under the Workmen's Compensation Act for injuries sustained by him as an employe of a subscriber under the Act. The compensation money had not been mixed with any other money. *Held*, that such money was not subject to garnishment. *Gaddy v. First Nat. Bank of Beaumont, Garnishee*, (Tex. Sup. Ct., 1926). (Not yet reported.)

Art. 8306, Sec. 3, REV. CIV. STAT. 1925, reads as follows: "All compensation allowed under the succeeding sections herein shall be exempt from garnishment, attachment, judgment and all other suits or claims." Appellant contended that this exemption should cease when the employe received the compensation, in line with the rule as to the exemption of current wages. Art. 3832, Sec. 16, REV. CIV. STAT. 1925. When such wages are collected by the employe, or voluntarily left in the hands of the employer, the exemption ceases. *Bell v. Indian Livestock Co.*, 11 S. W. 344 (Tex. Sup. Ct. 1889). But the several distinctions may be suggested. The wage statute uses the word "current," while no such word of limitation is used in the compensation statute. Furthermore, exemption of current wages is intended to benefit a man who is well and able to work, while the exemption of compensation is to protect one who is unable to do so. The latter should naturally be deemed worthy of a greater degree of protection, especially since the limitation of the exemption would deprive him of his means of support and thus destroy the purpose of the act. He might be able to use weekly payments so as to escape seizure, but he would be at a loss as to what to do with a lump sum payment, as provided for under certain conditions. Art. 8306, Sec. 15, REV. CIV. STAT. 1925. Thus it is believed that the court justifiably refused to put any limitation on the exemption of the compensation in the instant case.

Suppose, however, that the employe has contracted a debt for living expenses after he received the compensation, and process is sought against the money to secure its payment, would the result be the same? The purpose of the act would not be thwarted by refusing the exemption in this case and it is suggested that it should be liable to process for the payment of such debts. Another question presents itself. Suppose the compensation has been mixed with other funds? The court in the instant case intimated that its decision would probably be different in such a case.

H. G.

PROCEDURE—CONFORMANCE OF JUDGMENT WITH VERDICT.—Suit for personal injuries occasioned P when the car in which he was riding, and which was driven by X, collided with one driven by D. P sued D, who interpleaded X. In response to special issues the jury found that D's negligence was not the proximate cause of the collision but was a proximate contributing cause of such. *Held*, the findings of the jury were in such conflict that any judgment rendered would do violence to some finding of the jury. *Williams v. Zang*, 279 S. W. 815 (Tex. Comm. App., 1926).

Persons, whose negligent acts unite to cause a single injury, are jointly

and severally liable for that injury; and this though the separate negligence of each was not the sole cause of the injury, but only a contributing cause of same. *Markham v. Houston & T. C. Ry.*, 73 Tex. 247, 11 S. W. 131 (1889); *G. C. & S. F. Ry. v. McWhirter*, 77 Tex. 356, 14 S. W. 26, 19 Am. St. Rep. 755 (1890). It has been held, in effect, that "the proximate cause" is equivalent to the "sole proximate cause." *McAdoo v. McClure*, 232 S. W. 348 (Tex. Comm. App., 1922), *Bell v. Town of Lessor*, 143 Wis. 557, 128 N. W. 52 (1910). Hence the findings in the instant case are not in conflict. The finding that D's negligence was a contributing proximate cause of P's injury determined D's liability. The finding that D's negligence was not the proximate cause then became immaterial; for, though true, it would not entitle D to judgment in view of the other finding. *Stark v. George*, 237 S. W. 948 (Tex. Civ. App., 1922); 3 TEXAS LAW REVIEW 450. Since the trial court failed to give P judgment, the appellate court should have (TEX. REV. CIV. STAT. 1925, Art. 1856); the cause of action had been fully developed in the trial court and only questions of law remained undecided. *Defenbaugh v. American Sur. Co.*, 240 S. W. 578 (Tex. Civ. App., 1922, writ of error denied); *Wiseman v. Watters*, 107 Tex. 96, 174 S. W. 815 (1915).

This case shows the necessity of framing special issues carefully so that there will be no ambiguity in the findings. The issues should be so worded that when answered "yes" or "no" such findings will constitute an absolute denial or affirmation of facts necessary to the rendition of a judgment. Or, as one court and a text writer have put it, the issues should be the facts, as pleaded, put in question form. *First National Bank v. Peck*, 8 Kan. 660 (1871); SUNDERLAND, VERDICTS, GENERAL AND SPECIAL, 29 YALE L. JOUR. 253.

R. L. H.

RECEIVERSHIP.—FILING CLAIMS AFTER EXPIRATION OF TIME FIXED BY THE COURT'S DECREE.—The plaintiff sought to file a claim of which he was not aware until nearly eighteen months after expiration of the time fixed by the court's decree for filing such claim. The appellees alleged that to allow plaintiff's claim would work an injustice on certain parties who, relying on the assumption that no claims would be allowed except those which had been filed in accordance with the court's decree, had advanced money to the receiver, which was being used for purposes of reorganization, and that to allow plaintiff's claim would retard the progress of reorganization. Held, that the claim should have been allowed. *Employer's Liability Assurance Corporation v. Astoria Mahogany Co.*, 6 Fed. (2d) 945 (C. C. A. 2nd, 1925).

The court usually fixes a definite time in which claims may be filed and decrees that creditors who have not so filed their claims in the time specified shall be barred from sharing in the assets of the estate. Uncertainty as to the finality of such a decree is undesirable from the standpoints both of the creditors and the estate. TARDY'S SMITH ON RECEIVERS (Vol. 2, p. 1661, 1920 Ed.). When will a creditor who has not filed his claim in accordance with the court's decree be permitted to share in the assets of the estate? A claim which arose against the estate before the appointment of the receiver cannot be established after final distribution of the assets. *Halsted v. Forest Hill Co.*, 109 Fed. 820 (C. C. A., 1901); *Owen v. Homeopathic Mutual Ins. Co.* 10 N. Y. S. 75 (1890). And in absence of valid excuse for the delay such claims cannot be presented after expiration of the time fixed in the court's decree. *In the Matter of Harmony F. and M. Ins. Co.*, 45 N. Y. 310 (1871); *Chicago R. I. & P. Ry. Co. v. Lincoln Horse and Mule Commission Co.*, 284 Fed. 955 (C. C. A., 1922). But the question of allowing claims to be filed out of time is to be dealt with separately in respect to each claim. *Penn. Steel Co. v. N. Y. City Ry. Co.*, 202 Fed. 296 (1915). And where a valid



excuse is shown for the delay and neither creditor nor estate is prejudiced thereby a creditor is not precluded from establishing such a claim after the expiration of the time fixed by the court's decree. *Bank of Washington v. Creditors of Said Bank*, 80 N. C. 9 (1879); *Grinnell v. Merchant's Ins. Co.*, 16 N. J. Eq. 283 (1863). The allowance of claims which arose prior to the appointment to be filed out of time should rest within the sound discretion of the trial court, reviewable only for abuse. *In re Buzzell*, 91 Conn. 359, 100 Atl. 32 (1917); *Standard Lithographing and Printing Co. v. Twin City Motor Speedway Co.*, 140 Minn. 240, 167 N. W. 796 (1918).

Claims which arise during the receivership against the receiver are, in a manner, claims against the court and must be paid. TARDY'S SMITH ON RECEIVERS (Vol. 2, p. 1661, 1920 Ed.). A creditor whose claim arises against the receiver during the receivership is not precluded from establishing his claim after the time decreed has expired. *People v. E. Remington and Sons*, 14 N. Y. S. 98 (1891). The court may, however, require that all such claims be presented within a certain time after the discharge of the receiver and may transfer the property free of all such claims not so presented. *Western N. Y. & P. Ry. v. Penn. Ref. Co.*, 137 Fed. 343 (C. C. A., 1905). Art. 2610, TEX. REV. CIV. STAT., 1925, provides that a receiver may be sued without leave of the court which appointed him. Sec. 66, JUD. CODE, 5 FED. STAT. ANN. (2nd Ed.), p. 541, makes a similar provision in respect to any act or transaction of the receiver. Obviously, under these statutes the court which has charge of the receivership proceedings cannot control the time in which a creditor may establish his claim in another tribunal, but may exercise its control in the distribution of the assets while in the hands of the receiver. *Johnston v. T. & P. Ry.*, 76 Tex. 421, 13 S. W. 463, affirmed in 151 U. S. 81 (1894), 38 L. Ed. 81, 14 Sup. Ct. 250.

R. T. M.

SALES—SECOND-HAND MOTOR VEHICLES—EFFECT OF FAILURE TO COMPLY WITH STATUTORY REQUIREMENTS.—Hennessy purchased a second-hand automobile without securing the license tax receipt or statutory bill of sale, sold it without giving either receipt or bill of sale, and to secure his vendor's lien, insured the car with defendant insurance company. The car was destroyed by fire; defendant refused to make payment under the policy, contending that Hennessy had no title to the car and hence no insurable interest. *Held*, reversing the Court of Civil Appeals, 273 S. W. 1024, the sale was valid and Hennessy had an insurable interest, because (1) the statutory requirements are regulatory, not prohibitory, and the gist of the offense is not the sale, but failure to comply with the regulatory requirements, and (2) sales without compliance with the statute will be declared void only if the evil which the legislature intended to prevent is inherent in the sale itself; since the evil sought to be prevented was theft, which is not inherent in the sale, the sale will be held valid. *Hennessy v. Automobile Owners' Insurance Assn.* (Tex. Comm. App., 1926, not yet reported).

This decision overrules eleven Civil Appeals cases, uniformly holding sales void when made without compliance with the statute. These cases are discussed and the result of the instant case suggested as the proper one in 4 TEXAS LAW REVIEW 233. See also *Paragon Oil Syndicate v. Rhoades Drilling Co.*, 277 S. W. 1036 (Tex. Comm. App., 1926), discussed in 4 TEXAS LAW REVIEW 250, a liberal construction of the assumed name statute by the same section of the Commission.

V. E.

TELEGRAPHS AND TELEPHONES—DAMAGES FOR MENTAL ANGUISH SUFFERED BECAUSE OF DELAY IN DELIVERY OF TELEGRAMS NOT RELATING TO DEATH,



**BURIAL, OR SICKNESS.**—Plaintiff's son, who was mentally defective, was apprehended, after his escape from a hospital, by the sheriff of Bastrop County. In answer to requests by both the sheriff and her son the plaintiff gave to the agent of the defendant, who had full knowledge of all the circumstances, \$15 to be transmitted to the sheriff to be used in sending the boy home. This money was never delivered. Plaintiff after meeting trains for several days received a card from her son saying that he had received no money and was leaving Bastrop in a critical condition. In an action by the plaintiff to recover for breach of contract it was, *held*, that the plaintiff could recover for mental anguish as an item of damage. *Western Union Tel. Co. v. Brooks*, 279 S. W. 443 (Tex. Sup. Ct., 1926).

Texas was the first jurisdiction to allow recovery for mental suffering unaccompanied by physical injury resulting from breach of contract to deliver a telegram dealing with death, burial, or serious illness. *SoRelle v. Western Union Tel. Co.*, 55 Tex. 308, 40 Am. Rep. 805 (1881). After the case of *Stuart v. Western Union Tel. Co.*, 66 Tex. 580, 18 S. W. 351; 59 Am. Rep. 623 (1886), the doctrine became firmly established with liability placed on a contractual basis and has since been the rule in this state. *Western Union Tel. Co. v. Johnson*, 111 Tex. 1, 226 S. W. 671 (1920). This doctrine has been adopted by a number of the other states, but some have founded the liability in tort. 4 TEXAS LAW REVIEW 270. The general rule appears to be that in the case of money transfer messages damages will be limited to recovery of the amount plus interest, *DeVoegler v. Western Union Tel. Co.*, 10 Tex. Civ. App. 229, 30 S. W. 1107 (1895); *Robinson v. Western Union Tel. Co.*, 24 Ky. L. Rep. 452, 68 S. W. 656, 57 L. R. A., 611 (1902). But in cases where the telegraph company knows all the facts and it is contemplated at the time the contract is entered into that in event of a breach mental anguish will probably be suffered, courts will permit a recovery for this type of damage caused by delay in delivery of such messages. *Western Union Tel. Co. v. Simpson*, 73 Tex. 422, 11 S. W. 385 (1889); *Cumberland Tel. & Telephone Co. v. Quigley*, 129 Ky. 788, 112 S. W. 897, 19 L. R. A. (N. S.) 575 (1908).

Of the jurisdictions which permit recovery in telegraph cases for mental damages without physical injury, some limit its application to messages dealing with death, burial, or sickness. *Western Union Tel. Co. v. Sledge*, 153 Ala. 391, 45 So. 59 (1907). But the greater number permit recovery in cases in which the message deals with other subject matter. *Western Union Tel. Co. v. Hanley*, 85 Ark. 263, 107 S. W. 1168 (1908); *Postal Tel. Cable Co. v. Terrel*, 124 Ky. 822, 100 S. W. 292, 14 L. R. A. (N. S.) 927 (1907); JONES, TELEGRAPH AND TELEPHONE COMPANIES, 2nd Ed., Sec. 589. Several Texas Courts of Civil Appeals cases have taken this position. *Western Union Tel. Co. v. Procter*, 6 Tex. Civ. App. 300, 25 S. W. 811 (1894); *Western Union Tel. Co. v. Oakley*, 227 S. W. 211 (Tex. Civ. App., 1920). The court in the principal case has made a legitimate extension of the doctrine. Mental anguish may be just as acute and just as damaging to the sufferer in cases other than those involving death, burial, or sickness, and if, in accepting a message, the telegraph company has full notice of the facts and it is probable that a failure to deliver will cause mental suffering, such suffering is just as truly an item of damage in one case as in the other.

J. N. J.

**TRADE-MARKS AND TRADE NAMES—TERRITORIAL EXTENT OF THE RIGHT ACQUIRED—EFFECT OF REGISTRATION.**—The A. B. C. Stores, Inc., adopted and used in Galveston and Houston an advertising design consisting of blocks and letters embodying its name. The Texas Food Shop opened a store in Beaumont and by permission of A. B. C. Stores used the same design, and was known as the A. B. C. Store. When Texas Food Shop was sold it was

attempted to convey to the assignee a 25-year right to the use of the device; this attempted assignment was repudiated by A. B. C. Stores. A. B. C. Stores afterward opened up a store in Beaumont and proceeded to register the advertising device with the Secretary of State. The assignee of Texas Food Shop obtained an injunction against use of the device in Beaumont by A. B. C. Stores, on the ground of prior user in that city. *Held*, reversing the Court of Civil Appeals, 266 S. W. 551, (1) plaintiff cannot claim priority of adoption and use in Beaumont, in view of the permissiveness of its use there and its knowledge of the prior use by A. B. C. Stores in Galveston and Houston; and (2) registration of the device gave A. B. C. Stores a statewide right to its exclusive use. *A. B. C. Stores v. Richey & Co.*, 280 S. W. 177 (Tex. Comm. App., 1926).

The decision on the first point is satisfactory, if it be considered as based on the principle that A. B. C. Stores was entitled to exclusive use in Beaumont as part of its logical expansion territory. Still more satisfactory would a direct expression have been that prior use of a trade name or device entitles the user to exclusive use throughout the state. This latter view was advanced by Mr. Justice Holmes in *Allen & Wheeler Co. v. Hanover Star Milling Co.* (the *Tea Rose Case*), 240 U. S. 403, 60 L. Ed. 713, 36 Sup. Ct. 357 (1916), and suggested as the proper solution of the instant case in 3 *TEXAS LAW REVIEW* 300; see 38 *HARV. L. REV.* 839; 5 *BOSTON UNIV. L. REV.* 209; *NIMS, UNFAIR COMPETITION*, 2d Ed., 28. Protection of expansion territory was given in *Hygeia Distilled Water Co. v. Consolidated Ice Co.*, 144 Fed. 139 (1906); affirmed, 80 C. C. A. 506, 151 Fed. 10 (3d, 1907) (*Regis v. Jaynes & Co.*, 185 Mass. 458 (1904), *semble*); and has been given in several French cases. 56 *CHICAGO LEG. NEWS* 136. But most courts have followed the common law rule of extending protection only in the trade territory actually occupied by plaintiff. *Tea Rose Case*, *supra*; *Yellow Cab Co. v. Sachs*, 191 Cal. 238, 216 Pac. 33 (1923); *United Drug Co. v. Rectanus Co.*, 248 U. S. 90, 63 L. Ed. 141, 39 Sup. Ct. 48 (1918); *Kaufman v. Kaufman*, 223 Mass. 104, 111 N. E. 691 (1916). The aim of protection of expansion territory is to prevent theft of the reputation-good will of plaintiff in a territory which he has not yet entered to build up a trade- or custom-good will. This form of theft should not be any more condoned by the courts than ordinary robbery. Fraud on the public was perhaps not an important element in the principal case, but in many cases, where the reputation of a product or service has outrun its actual trade territory, deception of the public might be a very cogent additional reason for granting relief.

The orthodox view is that the right to use a trade name may not be assigned or licensed without a transfer of the business in connection with which it is used, since such assignment or license would permit fraud upon the public. *MacMahan Pharmacal Co. v. Denver Chemical Mfg. Co.*, 51 C. C. A. 302, 113 Fed. 468 (1901); *Falk v. American West Indies Trading Co.*, 180 N. Y. 445, 73 N. E. 239, 1 L. R. A. N. S. 704 (1906); 11 *CALIF. L. REV.* 134. But a transfer of the exclusive right to use a trade-mark in a given territory on a similar product has been held valid as a conveyance of the good will and business of the transferer in that locality. *Griggs Cooper & Co. v. Erie Preserving Co.*, 131 Fed. 359 (1904); *Batcheller v. Thomson*, 93 Fed. 660 (1899). And a transfer for a limited time (i. e., a license) of the exclusive right to use a trade name in a limited territory has been held valid. *Benioff v. Benioff*, 222 Pac. 835 (Cal., 1923); 20 *ILL. L. REV.* 90. In the principal case there was an actual good will and advertising value in Beaumont (else there would have been no more point to adopting this than to adopting any other catchy name and design); the court was therefore correct in recognizing the validity of the license which A. B. C. Stores made to Texas Food Shop, and the power of the licensor to revoke it.

Registration has generally been held to give no greater rights to exclusive use than existed at common law. *Derringer v. Plate*, 29 Cal. 292, 87 Am. Dec. 170 (1866); *Gaines & Co. v. Rock Spring Distillery Co.*, 226 Fed. 531 (6th, 1915); NIMS, 427. For the English view, see 57 SOLICITORS' L. J. 13. Art. 851, REV. CIV. STAT. 1925, providing for registration of trade-marks and trade names, declares that the certificate issued to the registrant shall be "sufficient proof of the adoption of the . . . design . . . and of the right to adopt the same." No reason is seen for questioning the soundness of the statement in the instant case that registration of a name coupled with prior user gives an exclusive right throughout the state, except that it is perhaps obiter. Such registration would necessarily still be held ineffective to give exclusive rights when a complainant shows that the registrant had no substantive right to exclusive use, by showing, for example, user prior to that of registrant. *Spiegel v. Zuckerman*, 188 Fed. 63 (2d, 1911); *Gaines & Co. v. Rock Spring Distillery Co.*, *supra*; *Planten v. Gedney*, 221 Fed. 281 (1915). But to all those who have not used it before registration, the registry should be constructive notice. The attitude of the court in the instant case is forward-looking, and the case as a whole represents a distinct advance in the law of unfair trade.

V. E.

TRUSTS—CREATION BY PAROL.—Defendant's intestate contracted to purchase land and obtained a deed, the seller taking back vendor's lien notes for the purchase money. Intestate later orally agreed that plaintiff by paying the vendor's lien notes might have the land. *Held*, that a valid trust was created. *Johnson v. Smith*, 280 S. W. 158 (Tex. Sup. Ct., 1926).

Oral trusts in land are prohibited by the seventh section of the statute of frauds. 29 CHARLES II, Ch. 3 (1676). This section has been adopted by most of the states. BOGERT, TRUSTS, 55. The eighth section of the statute excepts resulting and constructive trusts from its operation and this limitation has been followed in America. Therefore, if A buys land from B and takes title in C's name, a resulting trust in favor of A will be created. *Long v. Mechem*, 142 Ala. 405, 38 So. 262 (1904). But the trust must come into existence when the binding agreement is made, and therefore if C first intends to pay the purchase money and hold for himself, no later agreement between A and C by which A agrees to pay the purchase money will create a resulting trust. *Jacksonville Nat. Bank v. Beesley*, 159 Ill. 120, 42 N. E. 164 (1895).

Texas has never adopted any section of the statute of frauds relating to trusts. Logically, therefore, an express trust in land might be created by parol in the same manner as one of personalty. The early cases so held. *James v. Fulcrod*, 5 Tex. 512 (1851); *Mead v. Randolph*, 8 Tex. 191 (1852). The court also recognized a resulting trust as in *Long v. Mechem*, *supra*, and denied it in a situation similar to the *Jacksonville Nat. Bank Case*. *Williams v. County of San Saba*, 59 Tex. 442 (1883). The court later held that since a writing was, by statute, essential for a conveyance or sale of real estate, it was also necessary for a trust, as "the objection can not be met by merely changing the name of the transaction." *Allen v. Allen*, 101 Tex. 362, 107 S. W. 528 (1908). Statutes governing conveyances are not usually construed so as to include trusts, nor should they be. A conveyance involves delivery of title, a trust, retention of title with beneficial use in another. Under the holding of *Allen v. Allen*, a conveyance by A to B with an understanding that B would hold for C would be valid because there was a writing at the time, but an oral promise by A to hold for C, or a conveyance by A to B with a later agreement between B and C that if C would pay the remaining notes she might have the land, would create neither an express nor a resulting trust. The court said: "Certainly they (parol trusts) cannot be allowed



to embrace conveyances by one of his title to another, nor contracts by one to sell his title to another, for that would contradict the very terms of the law," and "such benefit (of *James v. Fulcro*d) was secured by agreements existing when the title vested under the written conveyances and subjecting those titles to the trusts."

The principal case can be reconciled with *Allen v. Allen* only in the last clause. The facts are identical except that in the earlier case the notes given were not made a lien on the land and consequently title had passed when the later agreement was made. Here the agreement was made long after the writing and *Allen v. Allen* is thus illogically limited by permitting a parol trust in land to be created after the writing so long as title had not passed. In spirit the cases are in conflict, as indicated by the other clauses quoted above. The principal case indicates a tendency to turn back to the doctrine of *James v. Fulcro*d, still the most reasonable construction of the Texas statutes.

W. F. J.

**WILLS—TESTAMENTARY CAPACITY—CHARGE OF THE COURT.**—In defining "sufficient mental capacity," the court charged that it was that condition of the testator in which "his or her mind and memory was sufficiently sound to enable him or her to know what is being done and the effect of the acts at the time of the execution of the will"; and refused to grant a special request to the effect that the "person making the will must, at the time the will is executed, have sufficient ability to understand the business in which she is engaged, the effect of her acts in making the will, the capacity to know the objects of the bounty and their claims upon her, and the general nature of her property." *Held*, as all the elements of the requested charge are essential, it should have been given on request. *Morris v. Morris*, 279 S. W. 807 (Tex. Comm. App., 1926).

The charge of the lower court is not without support on the bases of sufficiency and practicality. Since its suggestion in *Brown v. Mitchell*, 75 Tex. 10, 12 S. W. 606 (1889), it has been frequently approved, as by its adoption in *Warner v. Ellis*, 137 S. W. 1182 (Tex. Civ. App., 1911), and its adoption in principle in *Salinas v. Garcia*, 135 S. W. 588 (Tex. Civ. App., 1911) and *Vaughan v. Malone*, 211 S. W. 292 (Tex. Civ. App., 1919). But the weight of approval has sustained charges embodying the three essentials of testamentary capacity, ability to know those who have an expectancy, the extent of the testator's property, and the effect of the will on persons and property. *Prather v. McLelland*, 76 Tex. 574, 13 S. W. 543 (1890); *Trezevant v. Rains*, 85 Tex. 329, 19 S. W. 567 (1892); *Bradshaw v. Brown*, 218 S. W. 1071 (Tex. Civ. App., 1920). Instructions similar to those approved here were held too severe a test in *Lorts v. Wash*, 175 Mo. 487, 75 S. W. 95 (1903), and the charge of *Brown v. Mitchell*, approved in *Swyggart v. Willard*, 166 Ind. 25, 76 N. E. 755 (1906); but *Stevens v. Myers*, 62 Ore. 372, 121 Pac. 434 (1912), and *McNitt's Estate*, 229 Pa. 71, 78 Atl. 32 (1910), undoubtedly represent the weight of authority in approving this case in principle. As the Texas policy has been supposedly liberal as to wills and as to the court's charges, an instance of the latter being the recent growth of special issue submissions in popularity, this reversion to the standard charge seems regrettable. As combined accuracy and brevity in definition is always more preferable than extensive exposition, the simpler charge seems more practical as more understandable by the jury.

The principal case further holds that any departure from the statutory course of descent is unnatural, and is presumed to have been made "because of reasons rationally conceived," since testamentary capacity is essential to the validity of the will. In the effort to preserve intact the large feudal



estates of England, intestacy was then the natural state. But in Texas, where the theory is to give effect to the testator's intent as expressed in statutory form and the statute of descent and distribution is merely a presumption of intent in the absence of such expression, the normal estate is hardly intestacy. Neither does the necessity for testamentary capacity give rise to the theory that the disposition must be reasonable. If so, unreasonableness would cast a doubt on the testator's capacity. Though this is the indication of *Degemhardt v. Jones*, 239 S. W. 692 (Tex. Civ. App., 1922), it is unquestionably contra to the great weight of authority that one with testamentary capacity otherwise established may do as he pleases with his property. *Stolle v. Kanetzky*, 220 S. W. 557 (Tex. Civ. App., 1920); *Jones' Heirs v. Dorchester*, 224 S. W. 596 (Tex. Civ. App., 1921); and *Aylward v. Briggs*, 145 Mo. 604, 47 S. W. 510 (1898).

B. G.

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#### BOOKS RECEIVED

*Cases on Municipal Corporations.* By C. W. Tooke. Chicago: Callaghan & Co. 1926.

*Elements of Practice in the New York Courts.* By Edwin D. Webb. New York: Matthew Bender & Co., Inc. 1926.

*Lectures on Legal Topics.* New York: McMillan Co. 1926.

*Lycurgus or the Future of Law.* By E. S. P. Haynes. New York: E. P. Dutton & Co. 1926.

*Sumptuary Legislation and Personal Regulation in England.* By F. E. Baldwin. Baltimore: Johns Hopkins Press. 1926.

*A Treatise on the Law of Wills.* By John R. Rood. Second Edition. Chicago: Callaghan & Co. 1926.

## BOOK REVIEWS

A TREATISE ON THE SPECIFIC PERFORMANCE OF CONTRACTS, AS IT IS ENFORCED IN COURTS OF EQUITABLE JURISDICTION IN THE UNITED STATES. By John Norton Pomeroy. Third edition by John Norton Pomeroy, Jr., and John C. Mann. Albany: Banks and Company. 1926. One Volume. Pp. xl, 1045.

CASES AND OTHER AUTHORITIES ON EQUITY. Vol. 2. SPECIFIC PERFORMANCE OF CONTRACTS. By Walter Wheeler Cook. St. Paul: West Publishing Co. 1925. Pp. xvi, 838.

The third edition of Pomeroy's famous treatise and the second volume (albeit the last to be published) of Professor Cook's trilogy of case books on Equity, are important and complementary contributions to the literature of Specific Performance of Contracts.

The new treatise consists of the original text and footnotes, prepared by the elder Pomeroy for the first edition of 1879, intact and unchanged, save for two new sections, and of a supplementary series of footnotes, designated by letters instead of numerals, and printed in different type, embracing both the younger Pomeroy's contributions to the notes of the second edition of 1897, and his and the present editor's record of the developments of the last thirty years. The arrangement and sectionizing of the text remain the same, as does the table of contents. The index has been expanded to include, usually under old main headings, references to the new notes. The table of cases, unfortunately, has been omitted, and a relatively unnecessary table of abbreviations or key to citations inserted. The new edition is nearly double the size of the old one. Most of the new notes perform the function of a sort of glorified citator. Often the nature of the situation dealt with by a particular case is indicated by a phrase in parentheses. The great majority of the notes present descriptive statements of the effect of the many cases listed. These statements are not critical. They attempt to indicate what has been decided, but not to discuss its significance or desirability. Very little use has been made of the ideas suggested either in other treatises or in the excellent legal periodical literature available in this field. Notable exceptions are several references to the writings of Professor Williston, especially his discussion of the rights of creditors in connection with insolvency as a reason for granting specific relief, and the modification of Pomeroy's original statement of the principle of lack of mutuality of remedy to meet the criticisms of Lewis, Langdell and Ames. There is, however, an excellent collection of legislation affecting specific performance. And the notes of cases seem accurate, thorough and reliable.

The new case book, on the other hand, presents a vivid clash of ideas. The editor has approached the subject of specific performance from what he terms the analytical and functional point of view. The cases deal with fact situations that appeal to the student's pragmatic interests and awaken his analytical faculties in spite of himself. And the opinions, the excerpts from treatises and the wealth of periodical literature lead the reader to question the infallibility of many commonly accepted notions about specific performance and to attempt an evaluation of the social utility of this, that and the other method of handling particular problems. The material is provocative and often iconoclastic. The collection is distinctly American and modern.

It contains two hundred and forty-six cases. One hundred and ninety-two

of these, or about four-fifths, are from some thirty-seven jurisdictions in the United States. Only forty-seven cases are from English courts. Four are products of Ireland, and three of Canada. Four-fifths of the American cases and two-fifths of the British cases have been decided since 1880, the year following the appearance of the original Pomeroy. And the last fifteen years have furnished slightly less than one-fourth of the entire collection. On the other hand, the period prior to 1850 is represented by only thirty decisions, of which but nine are American. The Ames collection of 1904 has been duplicated to the extent of twenty-one American and twenty-nine English cases. The historical background, however, has not been slighted. Adequate material is provided in the form of references to and quotations from historical writings, in the form of opinions in modern cases tracing the principles involved from their English origin to their application in connection with present day conditions, and in the form of cases serving definite historical purposes. The historical approach that consists of long strings of early English cases showing in detail the growing pains of a given doctrine from conception to maturity, with an American case or two thrown in at the end to indicate the degree of following in this country, has, however, been abandoned.

Additional features are these: The two mutuality doctrines are dealt with side by side. The effects of various conceptions of lack of mutuality are shown upon the oil and gas lease and the co-operative marketing association. Included in the section on lack of mutuality are the cases of express and implied negative undertakings. The cases involving so-called "ordinary chattels" exhibit liberal attitudes toward specific relief. Eight cases define the equitable concept of consideration. There is a section on damages in lieu of specific performance under modern codes. The time of the essence cases present interesting factual problems of intention. Arbitration agreements are handled historically and under the new legislation. Cases from Wisconsin discuss the actuarial processes used in the evaluation of the wife's inchoate dower interest. Problems of statutory construction are raised by cases under the statutes of limitation in "fusion" states. The two most meticulous treatments are those embodied in the fifty-three case chapter on equitable conversion by contract and in the thirty-five case chapter on part performance and the statute of frauds. Much of the detail in the field of equitable servitudes is left to case books on property.

Prepared by men of widely different attitudes toward their common subject matter, with dissimilar conceptions of the object to be attained, and with disproportionate degrees of preparation for the task undertaken, these books are indeed complementary. Both should grace the shelves of all who have occasion to think about problems of specific performance. The case book, edited by one of the most independent and stimulating thinkers in the law school world, and designed mainly to afford a basis for critical discussion of the subject in the classroom, nevertheless acts as a leaven to the heavier and uncritical treatise. The treatise, whose present form is based about half on the preparations made by the younger Pomeroy prior to his death two years ago, and half on the completion of those preparations and the editorship of the whole by one of his last and ablest students at the University of Illinois, represents a carefully executed attempt to provide the practicing lawyer and judge with a substantially exhaustive collection of the enactments and decisions in this field. It furnishes the historical material of the elder Pomeroy's original notes, and the excellent modern bibliographical detail for which Professor Cook relied upon the now superseded article (by Professor Pomeroy, Jr.) in 36 Cyc. And the masterly analysis of the subject contained in the now fifty-year-old text of the treatise, supported by countless judicial citations

in the late as well as early cases, offers frequent ground for contrast with the later and more critical writings embraced in the case book collection.

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CONGRESS, THE CONSTITUTION AND THE SUPREME COURT. By Charles Warren.  
Boston: Little Brown & Company.

"It is with books as with men; the very small number play a great part, the rest are mingled in the crowd."—*Voltaire*. The distinguished author of "The Supreme Court in United States History" has, in producing the present volume, performed a public service of considerable magnitude. We find here a clear statement of our governmental theory regarding the power of the Supreme Court to disregard Acts of Congress in conflict with the Constitution. The authorities cited by the author include those men who framed, those men who ratified, and those men who administered the Constitution. Never tenable, in the light of the facts here for the first time forcibly and logically presented, the theory popularly referred to as "judicial usurpation" becomes ridiculous.

The plans of the late Senator LaFollette and of Senator Borah are considered in detail, and it is demonstrated that an adoption of either must involve a radical change in our system, the virtues of which change are doubtful and the vices obvious.

A concise statement is made of the decisions of the court affecting organized labor, and it is shown by the reported cases that the much talked about prejudice in favor of capital is non-existent. A serious and well-founded warning is sounded to those labor leaders who, being dissatisfied by the action of the court in certain cases, would destroy the greatest protector that laboring men have ever known. The book concludes with an able exposition of the independent attitude of the court, and a short summary of each of the fifty-three cases holding Acts of Congress unconstitutional.

The complete effect of the work is this: For the first time there is placed at the disposal of the people of this country an authoritative, exact and easily understood explanation of the position occupied in our governmental fabric, and the part played in the lives of our citizens by the Supreme Court of the United States. The book establishes conclusively that the claim of those who actively oppose the court that they seek to return to the people power now vested in, or as the statement is usually made "usurped by" the Supreme Court, is totally unfounded. It is shown that the attempt can only be to place the power now vested in the people by virtue of our system of constitutional amendment in the hands of Congress; to remove the check of the Constitution, and to make Congress supreme in every case except where an appeal is made to arms. In a country where the tendency to make such an appeal is only too strong, it appears of doubtful wisdom to multiply occasions where that appeal might be provoked. The temperament of the American people is opposed to all forms of tyranny, be it royal or legislative. The step urged by the opponents of the court is within the power of the people, but it will meet with little approval from those who seriously consider the facts and arguments so strongly stated by Mr. Warren.

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